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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 300

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

J. A. CZIZEK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 19, 1923

CERTIORARI AND RETURN FILED JULY 30, 1923

(29,562)

(29,562)

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1923

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada.

J. A. CZIZEK,

Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant.

COMPLAINT.

The above named plaintiff complaining of the above named defendant, avers:

I.

That the defendant is, and at the several times hereinafter mentioned was, a corporation duly organized under and by virtue of the Laws of the State of New York, and is now, and was at all such times, engaged in the business of a common carrier of messages by telegraph, for hire, and owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was engaged in transmitting telegraph messages for hire between said Cities.

II.

That on the 30th. day of November 1917, and for some time prior thereto, and ever since, said date, plaintiff was and is the owner of fifty shares of the capital stock of the Idaho National Bank, a corporation organized under the National banking laws of the United States, with its principal place of business at Boise, Idaho, which said shares of stock were of the par value of $100.00 per share.

III.

That during the latter part of October, 1917, plaintiff, while at Boise, Idaho, received information that one David Miller might desire at some future time, to purchase as much of the outstanding stock in said Idaho National Bank as he could obtain, for the purpose of effecting a consolidation of said bank with the Pacific National Bank of Boise, Idaho. That the plaintiff desired to sell his fifty shares of stock and was then about to leave Boise for his home in Oakland, California. That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National Bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock.

IV.

That a short time thereafter and early in the month of November, 1917, plain went from Boise to his home at 5767 Shafter Avenue, Oakland, California, where he remained from early in November, 1917, until his return to Boise about the middle of February, 1918.

V.

That on the 30th day of November, 1917, said T. J. Jones acting under the arrangement with plaintiff, set forth in paragraph III. hereof, presented to the defendant, at its Office in Boise Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks, supplied by defendant for that purpose, which message was in words and figures, as follows, to-wit:

"November 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

T. J. Jones."

That said defendant received and accepted said message and became thereby obligated to forward the same by telegraph to plaintiff in Oakland, California, and in considerattion thereof, said T. J. Jones, paid to the defendant the regular toll or

charge for transmitting said message amounting to sixty-five cents.

VI.

That on account of the gross negligence of the defendant said message was never transmitted by defendant to plaintiff, and was consequently never received by plaintiff.

VII.

That said T. J. Jones, by reason of his not receiving a reply from plaintiff to said message, made several inquiries of defendant at its office in Boise, Idaho, between said 30th. day of November, and the 4th. day of December, 1917, as to whether said message had been sent to plaintiff, and was informed by defendant that said message had been sent by defendant to plaintiff and had been delivered to plaintiff on December 1, 1917.

VIII.

That said T. J. Jones relied upon and believed said statements of defendant that it had sent said message and delivered it to plaintiff on December 1, 1917, and concluded that plaintiff was on his way to Boise.

That said David Miller then had the money with him at Boise, Idaho, for the purchase of said bank stock of plaintiff and said T. J. Jones, and on or about the 4th. day of December, 1917, said T. J. Jones sold his said bank stock to said David Miller for the sum of ninety dollars per share. That said

David Miller was then ready and willing to buy plaintiff's fifty shares of said stock and to pay therefor the sum of Forty-five hundred dollars, and plaintiff was ready and willing to sell the same for that amount, and except for the gross negligence of defendant in failing to transmit said message to plaintiff, the plaintiff would have then sold his said fifty shares of stock to said David Miller, and would have received therefor the sum of $4,500.00.

IX.

That plaintiff was not informed that said message had been delivered to defendant to be sent to him, until his return to Boise, Idaho, from Oakland, California, about the middle of February, 1918, and immediatetly upon learning such fact, plaintiff accompanied by said T. J. Jones, called at the defendant's Office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, and the original message which was delivered, by said T. J. Jones to defendant, on November 30, 1917, was then delivered by defendant to plaintiff.

X.

That on or about the 15th. day of February, 1918, said T. J. Jones, received from defendant a letter, in words and figures as follows, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY.
(Incorporated)
Manager's Office.

Boise, Ida., Feb. 14, 1918.

T. J. Jones, Atty at Law,
Boise, Idaho.

Dear Sir:

I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland., failed in transmission.

The employees concerned in the failure will be vigorously disciplined.

I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted and, in accordance with out custom in such cases, I enclose herewith the amount paid as tolls.

Yours truly,
G. H. Hackett.
Manager."

That said letter contained a check for said sixty-five cents tolls paid by said T. J. Jones for transmitting said message, which said check was not acceped by said Jones or by plaintiff, but was returned by them to defendant.

XI.

That ever since the time plaintitff first learned that said message had been delivered to defendant to be sent to him, to-wit: about the middle of February, 1918, his said bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank and its assets are being applied to the payment of its outstanding debts.

That plaintiff is informed and believes, and therefore alleges upon information and belief, that the

assets of said bank will not be greater than the said indebtedness, and that nothing will be available for the stockholders of said bank when such liquidattion is closed.

XII.

That by reason of the failure of defendant to transmit said message to him, plaintiff wholly lost the opportunity to sell his said bank stock, and has been unable at any time since to sell the same and said bank stock is still held by plaintiff and is without value, and by reason of such failure plaintiff has sustained damages in the sum of $4500.00.

XIII.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Forty-five hundred Dollars, with interest thereon from December 1, 1917, at seven per cent per annum, until judgment, and for interest on said judgment, and for his costs and disbursements incurred herein.

RICHARD H. JOHNSON,
Attorney for Plaintiff,
Residence, Boise Idaho.

(Duly Verified.)

Endorsed:

Filed in U. S. Court July 30, 1919.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

In the District Court of the United States for the District of Idaho, Southern Division.

J. A. CZIZEK,

Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY, a corporation,

Defendant.

At Law. No. 692.

ANSWER.

Comes now the above named defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

FIRST FOR A FIRST DEFENSE.

I.

Admits that this defendant is and at the times mentioned in the complaint was a corporation, duly organized under and by virtue of the laws of the State of New York, and is now and was at all such times engaged in the business of transmitting messages by telegraph for hire, and owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was at all times mentioned in the complaint and now is engaged in transmitting telegraphic messages for hire between said cities; but denies that this defendant is now or at any of the times mentioned in the complaint was a common carrier of such messages.

II.

As to the allegations of paragraph II of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that on the 30th day of November, 1917, or for sometime prior thereto, or ever since said date or at any time or at all, plaintiff was or is the owner of fifty or any shares of the capital stock of the Idaho National Bank, a corporation organized under the National Banking Laws of the United States, with its principal place of business at Boise, Idaho, which said shares, or any shares, of stock were of the par value of $100.00 per share, or any other sum.

III.

As to the allegations of paragraph III of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that during the latter part of October, 1917, or at any time or at all, plaintiff while at Boise, Idaho, or any other place, received information that one David Miller might desire at some future time, or any time, to purchase as much or any of the outstanding stock in said Idaho National Bank as he could obtain for the purpose of effecting a consolidation of said Bank with the Pacific National Bank of Boise, Idaho, or for any purpose, or that the plaintiff desired to sell his said fifty or any shares of stock or was then or at any other time about to leave Boise for his home

in Oakland, California, or any other place, or that prior to plaintiff's departure for California or any other place, or early in the month of November, 1917, or at any time or at all, plaintiff had an oral understanding, or any understanding, with one T. J. Jones, who resides at Boise, Idaho ,or who was also an owner of stock in said Idaho National Bank, or who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their stock jointly, or that such understanding was that said Jones should notify plaintiff at his home in Oakland, California, or any other place, whenever said Miller was ready to purchase their said stock, or any stock.

IV.

As to the allegations of paragraph IV, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that a short time thereafter or early in the month of November, 1917, or at any other time or at all, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, or any other place, or that he remained there from early in November, 1917, or any other time, or until his return to Boise about the middle of February, 1918, or at any other time.

V.

Admits that on or about the 30th day of November, 1917, said T. J. Jones presented to the defend-

ant at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks supplied by defendant for that purpose, which message was in words and figures as set forth in paragraph V of said complaint; and defendant alleges that a true and correct copy of said message, together with the provisions and statements on the telegraph blank upon which it was written is attached to this answer, marked Exhibit "A", and hereby referred to and made a part of this answer for the purpose of setting forth more fully the said message and the terms and conditions under which it was delivered to defendant and received by it. Admits that defendant received and accepted said message, but denies that defendant became thereby or otherwise obligated to forward the same by telegraph to plaintiff in Oakland, California, or elsewhere, except in accordance with the terms, conditions, rules and regulations printed upon said telegraph blank, as more fully shown by said Exhibit "A" hereto attached, and in this answer hereinafter alleged. Admits that said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents (65c).

VI.

Denies that on account of the gross negligence, or any negligence, of the defendant said message was never transmitted by defendant to plaintiff, or was consequently or otherwise never received by plaintiff.

VII.

Denies that said T. J. Jones by reason of his not receiving a reply from plaintiff to said message, or for any reason, made several or any inquiries of defendant at its office in Boise, Idaho, or elsewhere, between said 30th day of November and the 4th day of December, 1917, or at any time or at all, as to whether said message had been sent to plaintiff or in regard to said message in any way or at all, and denies that said T. J. Jones was informed by defendant that said or any message had been sent by defendant to plaintiff or had been delivered to plaintiff on December 1st, 1917, or at any time or at all.

VIII.

As to the allegattions of paragraph VIII of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that said T. J. Jones relied upon or believed said or any statements of defendant that it had sent said or any message or delivered it to plaintiff on December 1st, 1917, or that said Jones concluded that plaintiff was on his way to Boise; denies that defendant ever made any statements that it had sent or delivered said message, as aforesaid, or otherwise. Denies that said David Miller then had the or any money with him at Boise, Idaho, for the purchase of said Bank stock, or any bank stock or other stock, of plaintiff or said T. J. Jones, or that on or about the 4th day of December, 1917, or at any time or at all said T. J.

Jones sold his said bank stock, or any bank stock, to said David Miller for the sum of $90.00 per share, or for any sum, or that said David Miller was then ready or willing to buy plaintiff's fifty shares of said stock or any number of shares, or to pay therefor the sum of $4,500.00, or any other sum, or that plaintiff was ready or willing to sell the same for that amount or any amount, or that except for the gross or any negligence of defendant in failing to transmit said message, or any message, to plaintiff the plaintiff would have then sold his said or any fifty shares of stock to said David Miller or would have received therefor the sum of $4,500.00, or any other sum.

IX.

As to the allegattion that plaintiff was not informed that said message had been delivered to defendant to be sent to him until his return to Boise, Idaho, from Oakland, California, or elsewhere, about the middle of February, 1918, or at any other time, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies such allegations and each and every part thereof. Admits that about the middle of February, 1918, plaintiff accompanied by said T. J. Jones called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, but denies that the original message which was delivered by said T. J. Jones to defendant on November 30 ,1917, or at any

other time, was then delivered by defendant to plaintiff, or that plaintiff and said Jones, or plaintiff or said Jones, called at defendant's office immediately upon plaintiff's learning that said telegram had been delivered to defendant to be sent to him.

X.

Admits that on or about the 15th day of February, 1918, said T. J. Jones received from defendant that certain letter in words and figures as set out in paragraph X of the complaint herein, and that said letter contained a check for said 65c tolls paid by said T. J. Jones for transmitting said message, and that said check was not accepted by said Jones or by plaintiff but was returned by them to defendant.

XI.

As to the allegations of paragraph XI, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground defendant denies that ever since the time plaintiff first learned that said message had been delivered to defendant to be sent to him, to-wit, about the middle of February, 1918, or at any time or at all, plaintiff's said or any bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank, and its assets are being applied to the payment of its outstanding debts, or for any other reason or at all, or that the assets, or any assets, of said Bank will not be greater

in value than the said or any indebtedness, or that nothing will be available for the stockholders of said bank when such liquidation is closed, or at any time, or at all.

XII.

Denies that by reason of the failure of defendant to transmit said or any message to him, plaintiff wholly or otherwise lost the opportunity to sell his said or any bank stock, or has been unable at any time since to sell the same, or that said Bank stock is still held by plaintiff or is without value, or that by reason of such failure plaintiff has sustained damages in the sum of $4,500.00, or any other sum.

SECOND FOR A SECOND SEPARATE AND FURTHER DEFENSE.

I.

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all the times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstatet commerce, and that the message alleged to have been deliverd by said T. J. Jones to defendant was an interstate message to be sent from a point in the State of Idaho to a point in the State of California, and was as such interstate commerce, and that said message was delivered to and accepted by the defendant subject to the terms

of a certain contract in writing, a copy of which is attached to this answer, marked Exhibit "A", made a part hereof and hereby referred to for a more full and complete statement of the terms of said contract.

II.

That as more fully appears from said Exhibit "A", attached hereto, it was a term and condition of the said contract subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for damages or statutory penalties in any case where the claim therefor was not presented in writing within sixty days after the telegram was filed with the Company for transmission, and that no claim in writing was presented to defendant within sixty days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918, when plaintiff addressed a letter to defendant's Manager at Boise, Idaho, demanding payment of the sum of $4,500.00, with interest from and after the 9th day of December, 1917.

III.

That by the Act of Congress approved June 18, 1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State reg-

ulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

IV.

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above desscribed, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

V.

That the said stipulation in the contract subject to which said message was accepted, to the effect that claim in writing for any damage should be made within sixty days after the message was filed for transmission, was reasonable and valid

and binding upon plaintiff herein, and free from any regulation or control on the part of the State of Idaho.

THIRD FOR A THIRD SEPARATE AND FURTHER DEFENSE.

I.

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virture of the laws of the State of New York, and is now and at all the times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce.

II.

That the message referred to in the complaint was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is hereto annexed, marked Exhibit "A", hereby referred to, and made a part of this answer.

III.

That as more fully appears from Exhibit "A" hereto annexed it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or fore non-delivery of any unrepeated message be-

yond the amount received for sending the same; and that the said message was an unrepeated message and defendant was not directed or requested to repeat the same, and all that the defendant received in exchange for its obligation in respect to said message was the sum of 65c, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

IV.

That such message was an interstate message, to be sent from a point in the State of Idaho to a a point in the State of California, and was, as such, interstate commerce.

V.

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into "repeated" and "unrepeated"; a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the case of unrepeated messages defendant assumes no liability (except for gross negligence) beyong the amount received for sending the

same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract;) and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant, at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

VI.

That by the Act of Congress approved June 18, 1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Inter-

state Commerce Commission has ever since retained and still retains.

VII.

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liabil- and a lower rate for a less liability, as above described.

By reason of which, and of all the premises, the defendant says that the stipulation in the contract, subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of sixty-five cents, was resonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Idaho or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of sixty-five cents, with interest from the first day of December, 1917.

FOURTH FOR A FOURTH SEPARATE AND FURTHER DEFENSE.

I.

Defendants repeats all the allegations of the third and separate and further defense herein.

II.

Alleges that as more fully apears by Exhibit "A", hereto annexed, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

III.

That such message was an interstate message, to be sent from a point in the State of Idaho to a point in the State of California, and was, as such, interstate commerce.

IV.

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into messages valued by the senders

thereof at fifty dollar, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and tariffs for the transmission and delivery of messages are based on the assumption that the message is valued at fifty dollars or less, and that in the case of a message valued at a specified sum in excess of fifty dollars, it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

V.

That by the Act of Congress, approved June 18, 1910, (36 Stat. L. 539), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies, engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Inter-

state Commerce Commission has ever since retained and still retains.

VI.

That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all the premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 1st day of December, 1917.

WHEREFORE, having fully answered the complaint of plaintiff herein, defendant prays that plaintiff take nothing by his said action, that defendant be dismissed hence without day, and that defendant have judgment for its costs and disbursements in this action, most unjustly expended.

RICHARDS & HAGA,
Attorneys for Defendant.
Residence: Boise, Idaho.

(Duly Verified)

EXHIBIT A.

Class of Service Desired

WESTERN UNION Form 1206

Western Union TELEGRAM

Receiver's No. M. B. 60

Day Letter
Night Message
Night Letter x

Check 49 pdnl

Time Filed.

Patrons should mark an x opposite the class of service desired; OTHERWISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

Newcomb Carlton, President

George W. E. Atkins, First Vice-President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

BOISE, IDAHO

November 30, 1917.

J. A. Czizek,
5767 Shafter Avenue,
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait (year) and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will

you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.
(454 Yates B)
(.65c) (408-W)

ALL TELEGRAMS TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's mes-

sengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY

Incorporated

Newcomb Carlton, President.

CLASSES OF SERVICE.

FAST DAY MESSAGES

A full-rate expedited service.

NIGHT MESSAGES

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

DAY LETTERS

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for

the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission

and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

NIGHT LETTERS

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS:

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are bereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

Service of the above and foregoing Answer and receipt of a copy thereof is hereby acknowledged this 22d day of December, 1919.

RICHARD H. JOHNSON,
Attorney for Plaintiff.

Endorsed: Filed Dec. 22d, 1919,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

DECISION

February 21, 1922.

R. H. JOHNSON,
Attorney for Plaintiff.

RICHARDS & HAGA and
McKEEN F. MORROW,
Attorneys for Defendant.

DIETRICH, DISTRICT JUDGE:

Upon the general question discussed by counsel, I think it must have been contemplated by the appellate court that there would be a trial *de novo*. The direction is not that a judgment be entered for the plaintiff, or that the findings be made upon the evidence already taken, but for a new trial, without qualification or limitation. At such a trial I

am unable to see how I can properly exclude material evidence merely because it is new.

The additional evidence tends only to explain the failure to transmit the message. The former record was devoid of any showing suggestive of willful or fraudulent conduct, and there being no evidence other than the admitted fact of non-transmission, it was not thought a finding of gross negligence was warranted, even if such finding were to be regarded as material. The appellate court, taking a different view, held the default to be gross negligence; whether on the theory that a failure to send is inherently and necessarily so to be characterized or because the burden was upon the defendant to overcome a rebuttable presumption does not appear. If upon the former theory, the new evidence is, of course, immaterial; if upon the latter, it would seem to be sufficient to purge the defendant of the charge of *gross* negligence, to say the least. It tends to show that the defendant had in force a reasonable system of receiving and checking messages offered for transmission, and had exercised reasonable care in the selection of its employes. According to its office regulations, when the counter clerk received this message she should have put upon it certain notations, and then placed it upon the sending hook for transmission. Upon investigation immediately after the default was brought to his notice, the local manager found the message, not in the files of the day it was received,

but in the files of the preceding day, bearing the initials of, and certain notations made by, the receiving clerk, but without any perforation from the sending hook. Quite clearly the fault is chargeable to Margaret Brown, the receiving clerk, who was regarded as a competent employe. From all the facts the natural inference is that, having before her the files of the preceding day at the time this message was delivered to her for transmission, she inadvertently placed it with these earlier messages, and filed it away with them, instead of putting it on the sending hook. Unless the failure to transmit is to be deemed gross negligence *per se*, I am unable to find gross negligence.

But be that as it may, another consideration would seem to be controlling. Upon the assumption that a party to a telegram can be injured in one or more of only three ways—error in the delivered message, delay in delivery, or non-delivery, I had supposed that all possible contingencies were expressly covered by the stipulations upon which the defendant relies, and that it is immaterial whether the causative negligence occurred in the sending office, the receiving office, or a relay office. But as I construe the opinion of the appellate court, a different view is there held, and a substantial distinction is to be made between non-delivery attributable to negligence of the sending office and non-delivery due to negligence of employes at the receiving office. Discussing one of the stipulations pleaded by

the defendant, the Court says: "Granting such a restriction is valid and binding where there has been a mistake or delay in transmission or delivery, or where the message has been transmitted but not delivered, whether such errors have been caused by the negligence of the servants of the company or otherwise, we do not construe non-delivery as the full equivalent of non-transmission." Admittedly there was a failure to transmit, and if "non-delivery" as the term is used in the stipulations in question does not cover a non-delivery resulting from non-transmission, then, of course, the stipulations constitute no defense.

It is further urged by defendant that the appellate court does not criticise our former ruling to the effect that there was no sufficient competent evidence to warrant a finding that the plaintiff would have accepted Miller's offer or could have delivered the stock in time to avail himself thereof. It is true there was no comment by the appellate court upon this ruling, but by implication it was held to be erroneous, for if it was right the evidence did not warrant a judgment against the defendant, whatever views may have been entertained touching other features of the case, and upon such an assumption a new trial should not have been ordered. It must, therefore, be concluded that the court felt it was competent for the plaintiff to testify what he would have done if he had received the telegram, and that it should have been found

that he was able to deliver and would have delivered the stock in time to avail himself of the offer. There is now no additional evidence on that point.

There can, of course, be no question about the proper measure of damages ,and I think the evidence is sufficient to justify the finding that the stock became worthless soon after the telegram was tendered and has continued so to be.

Accordingly, in deference to what I understand to be the views of the appellate court, judgment will be entered in favor of the plaintiff for $4,500.00, with interest thereon at the rate of seven per cent from June 18, 1918, and costs.

Memo.

I have noted on requests for findings substantially what I shall find. Defendant's counsel may prepare formal findings accordingly.

Endorsed: Filed Feb. 21, 1922,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

SPECIAL FINDINGS OF FACT.

THIS CAUSE come regularly on to be heard on the 18th day of February, 1922, before the Court without the intervention of a jury, (the parties through their attorneys of record having before the

commencement of this trial, filed with the Clerk a stipulation in writing waiving a jury,) Messrs. Johnson & Nixon appearing for plaintiff and Messrs. Richards & Haga appearing for defendant, and the Court having heard the evidence introduced by the respective parties and being fully advised in the premises, makes the following special findings of fact herein, to-wit:

I.

That defendant at all times mentioned in the complaint was a corporation organized and existing under and by virtue of the laws of the State of New York, and was engaged in the business of a common carrier of messages by telegraph for hire, and was engaged in operating wire connections between Boise, Idaho, and Oakland, California, and other points, and in transmitting telegraph messages for hire between said cities.

II.

That on November 30, 1917, plaintiff was the owner of fifty shares of the capital stock of the Idaho National Bank, which stock had a par value of $100.00 per share, and plaintiff still owns said stock.

III.

That on November 30, 1917, said stock was held by the Security Bank of Oakland, California, as security for a loan.

IV.

That on Friday evening, November 30, 1917, T. J. Jones, acting as agent for the plaintiff, delivered to defendant at its office in Boise, Idaho, the following telegram, to-wit:

WESTERN UNION

Class of Service Desired		Form 1206
Fast Day Message	Western Union TELEGRAM	Receiver's No.
Day Letter		M. B. 60
Night Message		Check
Night Letter X		49 pdnl
Patrons should mark an "X" opposite the class of service desired; OTHER WISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.		Time filed

NEWCOMB CARLTON, President.
GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Nov. 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get

two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES,
(454 Yates B)
(.65c) (408-W)

V.

That the terms of the contract for the transmission of said telegram as shown by the printed stipulations on the back of the blank on which said telegram was written, introduced in evidence as defendant's Exhibit "A", were substantially as follows:

"*All telegrams taken by this company are subject to the following terms*:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNDEPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for

sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

"3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

"4. Telegrams will be delivered free within one-half mile of the Company's offices in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

"5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

"6. The Company will not be liable for damages or stautory penalties in any case where the claim is not presented in writing

within sixty days after the telegram is filed with the Company for transmission.

"7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

"8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY,
Incorporated.
NEWCOMB CARLTON, President."

"NIGHT LETTERS

"Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

"SPECIAL TERMS APPLYING TO NIGHT LETTERS:

"In further consideration of the reduced rate for the special 'Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

"A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

"B. Night Letters shall be written in plain English. Code language is not permissible.

"No employee of the Company is authorized to vary the foregoing."

VI.

That said telegram was delivered to and accepted by defendant, subject to the terms and conditions contained in such contract of transmission as above set forth.

VII.

That said telegram was an unrepeated message of the class known as night letter and was valued at $50.00 in accordance with the provisions of the telegraph blank above set forth, but was not specially valued in accordance with paragraphs 1 and 2 of the provisions above set forth, and no additional sum was paid or agreed to be paid for sending said telegram based upon any value in excess of said sum of $50.00.

VIII.

That said telegram was an interstate message to be sent from Boise, Idaho, to Oakland, California, and as such was interstate commerce.

IX.

That prior to the filing of said telegram with defendant, the Interstate Commerce Commission had full knowledge of the rates, charges and classifications established by defendant as set out on the blank on which such telegrams was written as

hereinbefore stated, and the form of such blank had been regularly filed with said Interstate Commerce Commission, and said Commission had acquiesced in and approved the provisions therein contained and the rates, charges and classifications thereby established, prior to the filing of said telegram with defendant, thus recognizing the right of defendant to charge a higher rate for a greater liability and a lower rate for a lesser liability.

X.

That on the 30th day of November, 1917, David Miller, the party referred to in said telegram, was ready, able and willing to buy the stock of plaintiff in the Idaho National Bank and continued ready and able to buy said stock until the 5th day of December, 1917.

XI.

That defendant on November 30, 1917, had in force a reasonable system of receiving and checking messages offered for transmission at its Boise office; that under the system employed by defendant, it was the duty of the receiving clerk to indorse her initials, the filing time and the amount of the toll on each message received, and place it on the sending hook for transmission. It was the duty of the operator transmitting the message to endorse his initials and the time of sending thereon, and all messages filed each day were required to be checked over to ascertain from the check marks if they had

been transmitted, and the messages for each day at the close of business were bound together and filed away.

XII.

That the telegram to plaintiff set forth above was received by the counter receiving clerk, Margaret Brown, now Mrs. Margaret Holland, and marked with her initials, and was by her inadvertently put in a file of messages which had been placed in the Company files prior to the date of such telegram, and when inquiry was made at the office of defendant by plaintiff in February, 1918, such telegram was found in said file of back date business and bore no perforation showing it had ever been placed on the sending hook, and no operator's check mark.

XIII.

That the clerk, Margaret Brown, was a capable and efficient employe, and the non-transmission of the telegram was due to her inadvertence and was not due to any wilful, malicious or wanton act on her part.

XIV.

That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence unless the failure to transmit a telegram constitutes gross negligence *per se*.

XV.

In deference to what is understood to be the view of the Circuit Court of Appeals, it is found that if plaintiff had received the telegram promptly he would have accepted the offer and could have delivered the stock in time to avail himself of such offer.

XVI.

That on February 14, 1918, plaintiff first learned that said telegram had been filed and the sender, T. J. Jones, that it had not been delivered, and upon that date together they made inquiry at the defendant's Boise office, whereupon after investigation, Mr. Hackett, Manager of the Boise office, addressed a letter to the sender, dated February 14, 1918, acknowledging the failure to transmit, and tendered the return of the charges paid, which letter was introduced in evidence as plaintiff's Exhibit No. 2. Sometime after this letter, Mr. Hackett went to the office of the sender, Mr. Jones, under directions from the District Commercial Superintendent of defendant, to ascertain the facts concerning the claim for damages, and as part of his general duty to make a report of the facts concerning all claims.

XVII.

That there was no written or formal demand for damages by plaintiff until June 18, 1918, at which time he wrote the letter introduced in evidence as

plaintiff's Exhibit No. 4, claiming damages in the sum of Forty-five Hundred Dollars ($4,500) and in response to this demand, promise was made to investigate, but without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank.

XVIII.

That the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted, and has continued so to be.

CONCLUSIONS OF LAW.

1. That the acts of defendant and its employes do not constitute a waiver of the provision requiring claim for damages to be made in writing within sixty days of the time the message was filed with defendant.

2. It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not tranmitted at all, it is accordingly held that plaintiff is entitled to judgment for damages in the sum of Forty-five Hundred Dollars ($4,500) with interest thereon from the 18th day of June, 1918, at the rate of 7% per annum, together with costs of suit.

Let judgment be entered accordingly.

Dated this 11th day of March, 1922.

FRANK S. DIETRICH,
Judge.

Endorsed, Filed March 11, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

JUDGMENT.

This cause having come on regularly for hearing on the 18th day of February, 1922, before the Court, without the intervention of a jury, (the parties through their attorneys of record having before the commencement of this trial filed with the Clerk a stipulation in writing, waiving a jury), Messrs. Johnson and Nixon, appeared for plaintiff, the Messrs. Richards & Haga, appearing for defendant; and the Court having heard the evidence in the case, and the arguments of the attorneys for the respective parties, and the cause having been submitted to the Court for its consideration and decision; and on the 11th day of March, 1922, Findings of Fact and Conclusions of law having been filed by the Court herein, and the Court having ordered that in accordance with said Findings of Fact and Conclusions of Law judgment be entered in favor of the plaintiff and against the defendant for the sum of Forty-five Hundred ($4,500) Dollars, with interest thereon from June 18, 1918, at

the rate of Seven per cent. (7%) per annum, together with costs of suit;

NOW, THEREFORE, By virtue of the law and by reason of the promises it is ordered, adjudged and decreed by the Court, that J. A. Czizek, plaintiff herein, have and recover of and from the Western Union Telegraph Company, defendant herein, Five Thousand Six Hundred and Sixty-three and 35 100 ($5,663.35) Dollars, together with plaintiff's costs herein taxed at $261.95 Dollars, and have execution thereof.

Signed and entered this 11th day of March, 1922

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed March 11, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

Be it remembered, That pursuant to mandate of the Circuit Court of Appeals herein the above entitled cause came on for trial *de novo* in the above entitled Court at Boise, in said District of Idaho, Southern Division, before the Honorable Frank S. Dietrich, on the 18th day of February, 1922, upon the issues joined in the pleadings without a jury, the parties hereto having theretofore filed a stipulation in writing waiving a jury, Messrs. Richard

H. Johnson and Carey H. Nixon appearing for plaintiff, and Messrs. Richards & Haga appearing for defendant.

The following constitute all the stipulations filed, proceedings had and evidence, oral and documentary, introduced at said trial.

The stipulation waiving a jury and providing for the use of the testimony taken on the former trial herein is as follows:

"(Title of Court and Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective attorneys, as follows:

1. The parties to said action hereby waive a jury trial and consent that said action may be tried by the Court without a jury.

2. That the testimony taken on the former trial herein may be considered as taken in this cause to the same extent as if the witnesses were produced and sworn upon this trial, subject, however, to all legal objections shown by the record on the original trial herein.

3. That in addition to such testimony the evidence herein shall be confined to the testimony of G. H. Hackett and Mrs. Margaret Holland, as shown by stipulations dated February 17th, 1922, and to such additional evidence upon the question of value of the stock of the Idaho National Bank as may be produced by either party herein.

Dated this 17th day of February, 1922.
RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Plaintiff.
RICHARDS & HAGA,
Attorneys for Defendant."

Thereupon counsel for plaintiff offered in evidence as Plaintiff's Exhibit 1 a typewritten transcript of the testimony taken on the former trial herein, and the same was admitted in evidence pursuant to the above stipulation and subject to all legal objections shown by the record on such former trial, and at the request of counsel for both sides the Court ordered that all adverse rulings of the Court should be deemed to have been excepted to. It was further agreed in open court by the attorneys for the respective parties that the offer of said transcript included the exhibits of both parties offered in evidence at the former trial in connection with the oral testimony, and thereupon counsel for plaintiff rested his case.

The following constitutes all of the evidence, oral and documentary, referred to as having been introduced at the former trial and considered as taken herein pursuant to the said stipulation:

T. J. Jones, produced as a witness on behalf of plaintiff, being duly sworn, testified as follows:

"I am sixty-two years of age and reside in Boise, Idaho, and am a lawyer by profession. I am acquainted with the plaintiff, J. A. Czizek, and prior

to November 30th, 1917, I was acquainted with one David Miller and was also acquainted with an institution known as the Idaho National Bank. I was a stockholder in that bank prior to December 4th, 1917, and owned individually, fifteen shares of stock. The par value of that stock was $100.00 a share. Prior to November 30th, 1917, or along during that month or in October, I had a conversation with the plaintiff, Mr. Czizek, with reference to the bank stock. Mr. Czizek and I were both stockholders. I had fifteen shares and Czizek had fifty. As I was here practically all the time and Czizek was here only occasionally, it was understood. ."

MR. MORROW: If the Court please, we object to the understanding between Mr. Czizek and Mr. Jones—

A. Well, it was agreed—

MR. MORROW: For the reason that counsel, by the amendment to the pleadings made some time ago, based his complaint upon the theory of a legal duty, making this in essence a tort action for breach of legal duty to transmit this telegram, and I think that if counsel is going to proceed upon the theory, which was apparently the theory of the original pleading, that there was an arrangement between Mr. Jones and Mr. Czizek, and the telegram was sent pursuant to that arrangement creating an agency, that he should be required to make

his position clear at this time, and I don't think that under the amendment to the pleadings, where he struck out the allegation of a promise to send this telegram, I don't think that this evidence is material or competent.

The Court overruled the objection, to which ruling defendant was allowed an exception by the Court.

WITNESS: It was agreed that neither of us was to sell unless we both sold, and that we were to try and get par, that is, the par value of the stock. Yes, in another conversation there was something said with reference to Mr. Miller being a possible purchaser. The last talk I had with Mr. Czizek prior to the sale of the stock which I think was in November, possibly in October, Mr. Czizek said that Mr. Miller would be here and he would have plenty of money to take care of and buy all the stock that Miller might deem was necessary to get control of the Idaho National or to consolidate with the Pacific National and make one god bank out of the two. And I knew that Mr. Miller was negotiating with the Pacific National Bank and I knew from talks that I had had with Miller that he was negotiating to build up the Idaho National Bank.

MR. MORROW: If the Court please, we move to strike the statements made as to what Mr. Czizek said, as distinguished from what the witness knew

himself, on the ground that they are hearsay, and do not tend to prove that Mr. Miller was preparing to buy this stock.

MR. JOHNSON: We didn't offer it for that purpose, Your Honor.

THE COURT: The objection is overruled.

Thereupon the Court allowed defendant an exception to said ruling.

The witness continued:

Mr. Miller at that time was Vice President of the Idaho National. He then owned stock at that time. He had paid me for what was known as the Fletcher stock, $15,000 for two hundred shares. I had a good many conversations directly with Mr. Miller with reference to this stock.

Q. (By MR. JOHNSON): Well, it is not necessary to detail them all, but what was it in substance?

MR. MORROW: If the Court please, we object to any evidence as to conversations had by the witness with Mr. Miller regarding the purchase of the stock in question, being the stock of the plaintiff, or other stock of the Idaho National Bank, about this time, on the ground that it is hearsay and incompetent, irrelevant, and immaterial to prove or disprove any of the issues in this case, the question being, under the pleadings, and being placed in is-

sue, that at the time this telegram was sent and shortly thereafter Mr. Miller was ready and willing to purchase the plaintiff's stock, and we think that evidence as to what Mr. Miller may have told the witness is clearly hearsay, and object to it on that ground, and on the ground that no proper foundation has been laid for the introduction of such evidence.

THE COURT: What do you offer this for, Mr. Johnson?

MR. JOHNSON: We don't offer it for the purpose of proving what Mr. Miller's action might have been, but merely the facts leading up to the sending of this telegram as allaged in the complaint. We will offer other proof on the other question.

THE COURT: Well, with that understanding, I think I shall let it go in, as merely explanatory of the circumstances.

MR. JOHNSON: That is all right.

Whereupon the Court allowed defendant an exception to said ruling.

The witness continued:

A. Well, the conversation on the 30th of November I think was in 1917, that is, the day the message was sent, Mr. Miller wanted to know what stock I controlled and could deliver and I told him sixty-five shares, my stock and Czizek's stock. This

conversation took place in Boise on the street. And I think later in the day Mr. Miller came up to my office, and we made an appointment for that evening, in the Idaho National Bank; and that evening we met in the Idaho National Bank, and there was present Mr. Miller and myself in the front end of the bank, and in the rear end of the bank Miss Nellie Wilson was present, and we took up the question of the stock, and he offered $90.00 a share for the 65 shares, mine and Czizek's, and started to get a statement showing that that was all the stock was worth at that time, and stated that his purpose in getting the stock was so that he could control the bank, and if he didn't get the stock that the bank would go into liquidation, and it would be a year or eighteen months before we would get anything, and if the bank realized on all its papers the surplus funds, the most we could hope to get would be $110.00 a share, and we might not get anything. At that point I interrupted him, and I said, "Miller, there is no use in discussing the purchase of this stock unless you have got the money to pay for it, a cash transaction." And as I recall it, there was a book lying on the counter—the desk run this way, and inside there was a long counter, and there was a book lying there. He says, "There is the books and there is Nellie," meaning Nellie Wilson. "And I went over to Nellie, and I said, 'Nellie, Miller is figuring on buying this stock.' And she said, 'Does that include Czizek's stock?' and I

said, 'Yes. Has Miller the money to pay for it?' She said, 'Sell. He has got money enough here to take care of any check that he will issue for you.' I got Czizek's address from Nellie. The bank had his address. And went back to Miller and pencilled a telegram and read it to Miller, and he said it was satisfactory, and I took it back to Nellie, and she run it off in triplicate. I came back to Miller and read the telegram, and I struck out one word and he added one word. The word I struck out was "here" and I wrote in ink "year". And he wrote in ink at the end of the message the word "answer".

MR. JOHNSON: I would like to have this marked as Plaintiff's Exhibit No. 1 for identification.

Said document was thereupon marked Plaintiff's Exhibit No. 1.

WITNESS: Plaintiff's Exhibit No. 1 for identification is a telegram, the telegram that I prepared in triplicate in the bank on that evening. It is one of the three. I gave one to Miller and I took the other two up to the office. I left one in the office and I gave the other to my son Felix and told him to take it up to the telegraph office right away and pay the charges and send it.

Thereupon the paper marked Plaintiff's Exhibit No. 1 for identification was introduced and admitted in evidence and said paper is in words and fig-

ures identical with the telegram set out in the special findings of fact herein except that the pencil notation in the upper right hand corner "M. B. 60" "49 pdnl" and the pencil notation in the lower right hand corner "(454 Yates B)" "(65c)" "(408 W)" do not appear upon said Exhibit 1.

The witness continued:

Mr. Miller wrote the word "answer" in pen at the end there on the telegram, and I struck out the word "here" and wrote "year". When I left the bank and took the two copies of the telegram up to my office, my son Felix Jones and I think his brother Tom were present in my office. I then gave the telegram to Felix and I think I put the other copy in the safe. I gave directions to my son Felix to take the telegram immediately to the telegraph office. First I told him to go to the safe and take sufficient money and to go to the telegraph office and send that telegram and prepay the charges. He then left with the telegram. My recollection is that the 30th of November of that year was a Friday and that this was a Friday evening, and the next day Mr. Miller came up to the office and wanted to know if I had heard from Czizek and I told him no. He said he was very anxious to get this stock and any other stock that I had, and said we could go ahead and close the deal, and that if I didn't have the Czizek stock that could be put in later. He seemed to have the impression that I

had the Czizek stock—and as to the probability of the message being delivered. I said, "Well, the company would have until noon to deliver the message and Czizek might not be in the house at the time, and we would leave it go until evening." Czizek's address that I got at the bank is the address that is on that telegram, in the city of Oakland, California. Continuing my conversation with Mr. Miller I said that the next day being Sunday intervening, it wouldn't really make very much difference, so on Sunday I requested Felix to go to the telegraph office and see if he could get any information with reference to that telegram, and he came back and reported that—

MR. MORROW: We object to what he reported.

THE COURT: Sustained.

MR. JOHNSON: That was merely, Your Honor, not to suggest that the telegraph company made any such statements as that, but merely to show the connection of his conversation with Miller, explanatory, so that we could understand Miller's subsequent actions. I expect to offer other evidence as to what he told him.

THE COURT: Very well. With that understanding.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He reported to me that the telegraph office said the message had been delivered to Czizek at Oakland, California. That was what I told Mr. Miller. Then on Monday Mr. Miller came up and he wanted to know if I had heard anything from Czizek and I told him no. That would be Monday. That would be the 3rd of December. And he wanted to know if he was in town, and I said I had stopped at the Idanha and he wasn't there, and I went and called up the Idanha and they said he wasn't there. Miller said he thought he was on his way to Boise. I said I thought he was, too, having received that telegram and not having answered, that I thought he was on the way and had the stock with him. Then Miller said to me—

MR. MORROW: We object to further testimony as to what Mr. Miller may have said, on the ground that it is hearsay and incompetent. The evidence that has already gone in I think is merely explanatory, but anything further that was said must necessarily relate to matters arising after the telegram was sent, and, if relevant at all, would have to bear upon the issue of Miller's readiness and willingness to buy that stock at that time, on the 3rd day of December.

MR. JOHNSON: This is merely explanatory, if the Court please.

THE COURT: I think I shall let it go in. You may continue.

To such ruling defendant was allowed an exception by the Court.

WITNESS: Miller said to me, "You transfer your stock"—my individual stock. That is the first time that I recall now that my individual stock came up. "I am going down to Salt Lake, and I will try and see Czizek, and if I do I will close with him there; and if I don't see him and he comes through, the money is in the bank. I have given instructions to the bank to turn the money over." The money could have been put, according to Miller's statement, could have been put to my credit or Czizek's. Miller was willing at any time to pay the money if I would agree to turn over the stock or see that it was turned over. I told him at that time that I wouldn't deliver my stock, that it was selling for less than par, and I wouldn't break my word to Czizek for $1350.00, and he represented that at any time that Czizek and I would take the money and the stock would be delivered, that it would be paid for, that the bank would pay for it, and all I had to do was to take it to the bank, or, if I preferred, the money would be placed to credit as I would designate. At that time I told Miller that I wouldn't sell my stock until Czizek's and mine went together. Yes, my office is in the same building as the bank. Later in the day Mr. Miller called me up and asked me to come down to the bank, and I think I went down, and Miller asked me if I had the stock with me, and I told him no;

and we had another conversation about the stock, and he came up to the office, and he said that I was interfering with his plans by not closing the deal, and to that extent was hurting the bank, and that there couldn't be any possible injury to Czizek or anybody else by closing the deal; and that he was going out of town, and he wanted the matter closed. I again refused to turn the stock over, but after he went out, in talking the matter over with Felix, I took my stock and went down to the bank. I said to Miller, "I have my stock." He said, "I am going out of the bank; put it on my table. When I come in I will give you a check or put the money to your credit." I went over to the table and put my stock on his table, unendorsed, and went down in the afternoon, and Miller was in the bank. And I said, "Miller, I have left my stock on your table unendorsed." He said, "I wouldn't give you your check until it was endorsed." I said, "Neither would I endorse the stock until it was paid for; this is a business transaction. If you want the stock give me your check and I will endorse it." He wrote a check for $1350.00, and I took the check over to the cashier and had it cashed and entered in my bank book, and went back and endorsed the stock.

I next saw the plaintiff, I think, about the middle of February, 1918. I met him at the corner of Ninth and Main streets in Boise, Idaho. I had a conversation with him there. After we had shook hands, I said to him, "Why in hell didn't you an-

swer my telegram?" He said, "What telegram?" I said, "That telegram that I sent you to Oakland. I had your stock sold." He said, "I never got the message." I said, "The office reported that it was delivered to you at Oakland, California." He said, "Did the office say that?" I said, "Yes." He said, "Let's go up to the office." We went over to my office, and I gave him, Czizek, this triplicate of the telegram that I had in my office. Yes, I am sure about giving him this triplicate of the telegram I had in my office. And we went up to the telegraph office together, and Mr. Czizek asked for Mr. Hackett. Mr. Hackett came up to the counter. Mr. Hackett was supposed to be the manager of the Western Union. He had been there a long time. Czizek read this telegram to Hackett, and Hackett asked Czizek to let him see it, and Czizek handed it to him, and Hackett turned to go away with the telegram, and I objected, and he handed it back to Czizek and said he would look it up and let us know later. And Czizek and I left the telegraph office together. Either that day or the next day or the following day, within a day or two, I received a letter from Mr. Hackett and in that letter was enclosed a check or a draft for I think sixty-five cents; anyway, it was the amount of money that Felix had paid for sending the message.

MR. JOHNSON: I will ask that this paper be marked as Plaintiff's Exhibit No. 2 for identification.

Said paper was thereupon marked Plaintiff's Exhibit No. 2.

WITNESS: This paper marked Plaintiff's Exhibit No. 2 for identification is the letter that I received from Mr. Hackett enclosing check. I am not sure whether it was a check or a draft for sixty-five cents. Yes, that is the original letter.

Thereupon the letter was offered and received in evidence, and marked Plaintiff's Exhibit No. 2, and is in words and figures as follows:

(Letterhead of Western Union Telegraph Co.

"Boise, Idaho, Feb. 14, 1918.
"T. J. Jones, Atty. at Law,
"Boise, Idaho.
"Dear Sir:—

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls.

"Yours truly,
"G. H. HACKETT, Manager."

WITNESS: Either the day that I received the letter and check or the next day or maybe the day after that, I wrote Mr. Hackett a letter returning

the check or draft, whichever it was. I kept a duplicate of that letter.

Thereupon, Plaintiff's Exhibit No. 3 was offered and introduced in evidence, and is in words and figures, following:

"JONES & JONES,
Lawyers
BOISE, IDAHO,
"Feb. 18, 1918.

"The Western Union Telegraph Co.,
"G. H. Hackett, Manager.
"South 8th St., Boise, Idaho.
"Gentlemen:—

"Your letter of Feb. 14, 1918, to hand, containing your check No. 62 dated Boise, Idaho, Feb. 14, 1918, on First National Bank of Idaho Boise, Idaho, payable to the order of T. J. Jones in the sum of $0.65.

"Toll paid on message filed in your Boise office Nov. 30, 1917, addressed to J. A. Czizek, Oakland, Cal., which you say failed in transmission.

"An acceptance of the check on my part might be construed as a settlement of the matter. I therefore return check to you.

"Yours truly,
"T. J. JONES."

WITNESS: After I had replied to Mr. Hackett's letter returning the check or draft, whichever it was, Mr. Hackett came up to my office and he said—

MR. MORROW: We object to what he said. It is not shown that any statements he made were in the course of his employment or binding upon the defendant.

MR. JOHNSON: Q. Was he General Manager of the company at that time?

A. He said he was.

THE COURT: The objection is overruled.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He said. "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." I said, "All right." He said, "It is unfortunate that it didn't go through, and the company will settle it. There is no question about their liability," or words to that effect.

MR. MORROW: We move to strike out the last statement about liability, because it is a conclusion.

MR. JOHNSON: It isn't binding on the company—we realize that, Your Honor. It is merely explanatory.

THE COURT: Very well.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock—

THE COURT: Well, now, apparently this isn't very material, do you think?

MR. JOHNSON: It is only material as to what follows, Your Honor, with reference to some further questions that he asked him. And then it has materiality in this way, in connection with some further facts that I intended to prove, in an attempt to show a waiver by the company of the sixty-day provision set up as a defense, this among various other circumstances which I will argue to the Court constituted the waiver. This is just one circumstance connected with others, and while possibly of itself it would be subject to the objection, I thought that after the testimony was in the Court could give it such legal effect as he thought necessary, as long as this case wasn't being tried before a jury, and I would introduce it.

MR. MORROW: We wish to make the further objection that it is apparently—it didn't develop until this last statement—that it is an offer or some negotiations concerning a compromise of the claim ,and I don't think that is admissible.

MR. JOHNSON: Well, it isn't seeking to establish that the company has admitted its liability.

THE COURT: I would be quite clear that it isn't proper evidence at the present time if you were trying the case before a jury. Isn't it more properly rebuttal if you are offering it only for the purpose suggested, a waiver of that defense?

MR. JOHNSON: Possibly it would be, Your Honor, more in the nature of rebuttal, but if that

particular objection isn't raised, I would like to have Mr. Jones testify at this time, because his health is very poor and he has to leave here in a very short time.

MR. MORROW: We wouldn't care to make the objection, in view of that situation, Your Honor, on the ground that it is properly rebuttal, but I want to call attention to the further fact that the conract provides that no employe is authorized to vary the foregoing provisions, including the sixty-day provision, so the only possible competency of this evidence would be on the ground of this question of waiver, and I think that is sufficiently clear upon that provision, that Mr. Hackett couldn't waive that by any statement he might make.

MR. JOHNSON: I realize that there is perhaps a question of law there, which perhaps we would better take up in the argument of the case. There are some authorities that hold that a manager can waive those provisions, and there are numerous other matters in connection with the waiver that I think should perhaps all be taken together, and the Court can give them the legal effect necessary.

THE COURT: Well, perhaps we can get at it more directly and more briefly in that way. You may proceed.

MR. JOHNSON: Q. Go ahead.

WITNESS: What was the last question?

MR. MORROW: Do I understand the objection is overruled?

THE COURT: No. The testimony will be admitted, subject to the objection.

Upon final consideration of the case the Court admitted the testimony and allowed defendant an exception to such ruling.

The last question was read to the witness.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" I said, "Yes." He asked me what the stock was worth and I referred him to Mr. Streeter, the cashier. He said, "I would like for you (meaning me) to fix the value, as I think you would be fair, and I have taken this matter up with the company." He said, "As I understand it, the banks have guaranteed the depositors, and there can't be any liability attach to the stockholders." I said that statement was only partially correct, that instead of the stock being worth something, the liability might attach to the stockholders, as the banks had only guaranteed the depositors, and hadn't guaranteed any of the indebtedness of the bank, if there was any. Well, I think that that was all that was said at that time that related particularly to this matter. If I had any further conversation with him after that time I do not recall.

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: The date on which I sold my stock and got this check was the 4th of December, 1917. No, this telegram was not written in my office at all. It was written down at the bank, in triplicate. We used that blank of the company, the same as that one that was introduced in evidence, for all three of the telegrams. All three of them were on the same form as Plaintiff's Exhibit No. 1. I think they were on the same form. I know the wording was the same in all of them.

MR. MORROW: Will you mark that as Defendant's Exhibit A?

A certain paper was thereupon marked Defendant's Exhibit A, which was read by Mr. Morrow to the witness, and is in words and figures the same as Plaintiff's Exhibit No. 1.

WITNESS: Yes, these two are part of the three triplicates. These two are two of the three triplicates.

(Witness excused.)

J. A. CZIZEK, the plaintiff, produced as a witness on his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is J. A. Cizek, my age 55,

my residence, Oakland, California. I am acquainted with a bank known as the Idaho National Bank. I am a stockholder in that bank. I own fifty shares of stock. The par value of that stock is $100. I I owned fifty shares of stock in the month of November, 1917. I was acquainted at that time with one David Miller, and also with T. J. Jones, the witness that just testified.

Q. State whether or not you had a conversation with Mr. Miller some time along in October or the first part of November, 1917, with reference to the Idaho National Bank.

MR. MORROW: If the Court please, we object to that conversation, if it relates to the shares of stock, or a sale of the shares of stock owned by the plaintiff, to Mr. Miller, on the ground that Mr. Miller's statements in regard to that would be hearsay and not competent.

MR. JOHNSON: This is simply in line with the allegations of the complaint, Your Honor, and is explanatory, and leading up to the sending of the telegram.

MR. MORROW: The fact is in evidence that the telegram was admitted. And it seems to me that counsel is attempting to put in his case here on the statement to the Court that all of his evidence is explanatory of something, and I don't think the mere fact that it is merely explanatory excuses

it if it is hearsay, and offers to prove one of the substantive issues in the case.

THE COURT: Is this the talk with Mr. Miller?

MR. JOHNSON: Yes, this is the talk with Mr. Miller which led up to the conversation that the plaintiff had with Mr. Jones with reference to the sale of the stock, that they would both sell their stock together, which resulted in sending the telegram, and it is alleged in the complaint, and was taken up on the demurrer.

THE COURT: Very well. He may answer.

To which ruling defendant was allowed an exception by the Court.

WITNESS: I came from my operations in central Idaho to Boise along about the middle of November. I would judge, in the year 1917. Prior to this I had received several communications from Mr. Miller about things generally with reference to bank, etc., and the question of purchasing the stock or entering into a marger with the Pacific National Bank that he talked to me about, was discussed. I told him I didn't want to enter into any merger, that I wanted to sell my stock. I had had some bad bank stock experience, and I didn't want to have the stock. We discussed the value of it pro and con for a little while and didn't arrive at anything, because I learned that he was not ready just then to buy it, but he told me he was going away a

that he would be back at a certain time, or near a certain time, when he would be ready to negotiate with me further, and we would have no trouble about agreeing on the price, and he would buy my stock. Yes, I had a conversation after that with Mr. T. J. Jones with reference to this matter. After Miller and I had our talk, I went to Mr. Jones, who was also a stockholder, that I knew, and we had talked about this matter more or less at different times, and told him what Mr. Miller told me, that he would be back with the money to buy our stock, and this merger that he talked of, and that I wanted him to negotiate with him for me, that we would sell together. He wished to buy both our holdings together. I afterwards told Mr. Miller after talking with Mr. Jones, that Mr. Jones could negotiate for me, and I left for California. I left Boise within a day or two after that. My address was always in the Idaho National Bank. My Oakland address at that time was 5767 Shafter Avenue, Oakland. I was at my home in Oakland continuously between November 30, 1917, until about shortly after the first of February, excepting little drives out in the country. I did not receive any telegram from Mr. T. J. Jones. I received nothing with reference to the bank stock.

Q. If you had received that telegram, Plaintiff's Exhibit No. 1, what would have been your attitude with reference to this stock?

MR. MORROW: If the Court please, we object to evidence as to what his attitude would have been, on the ground that it is incompetent, irrelevant, and immaterial. I would like to state that objection a little more in detail, if the Court please. And particularly for the following reasons: Because the witness is asked his present opinion on a past condition of things that never existed, but is now summoned before his mind as conjecture. He is asking the present opinion of the witness as to what he would or would not have done in a stated contingency. It is contrary to public policy, as tending to encourage corrupt testimony, and has a vicious tendency. The allegations of the complaint show that plaintiff did not suffer any actual loss other than a possible opportunity, for which a recovery is precluded under the law. The telegram shows that the sender was asking information or advice as to whether or not he should sell his own stock. The telegram is in evidence, and the Court can determine that. The complaint shows that there was no obligation out of which any loss could have resulted. The damages sought are too uncertain, contingent, and remote, to render any testimony in relation thereto competent. The sale of said stock depended upon the independent will of the plaintiff, and that was a contingency that precludes recovery and renders the testimony incompetent. And the sale of the stock also depended on the indepen-

dent will and ability of the party referred to, David Miller, to purchase the stock, and that also is a contingency which precludes recovery and renders the testimony incompetent. In other words, Your Honor, we are objecting to any evidence as to what this witness' attitude would have been if he had received this telegram, because he has just testified that he didn't receive it. And if the Court cares to go into this matter at this time we have the authorities I think that amply sustain our position.

THE COURT: I think I shall receive the testimony subject to the objection. It may be rather a nice question as to whether it is competent. You may proceed.

MR. JOHNSON: Go ahead, Mr. Czizek.

WITNESS: The question, please.

(Question read.)

A. I would have sold it. I was seeking to sell it.

Q. What would your reply have been to the telegram if you had received it and answered it?

A. To accept it.

MR. MORROW: May it be understood that this same objection goes to all this class of testimony?

THE COURT: Yes.

A. I should have wired a reply of acceptance.

Upon the second trial herein, out of deference to what was understood to be the ruling of the Circuit Court of Appeals upon said question the Court overruled said objection, admitted the evidence and allowed defendant an exception to such ruling.

WITNESS: After that time I returned to Boise about the 13th or 14th of February, 1918. I had not seen Mr. Miller in the meantime. I saw Mr. Jones after my return to Boise. I am not certain whether it was the same day I arrived or the following day, I met Mr. Jones on the street. He immediately wanted to know why I didn't reply to a message he sent me about the bank stock. I told him I hadn't received any message about the bank stock. Well, he had sent me a message and everything was all fixed. And among other things, he invited me to his office and showed me a copy of a message he had sent, or a message that was supposed to have been sent to me. We discussed the thing a little bit, and I suggested that we go down and see Mr. Hackett. We went down to the telegraph office and I called for Mr. Hackett personally and discussed the matter with him. I was very well acquainted with Mr. Hackett for twenty years or more. Well, Mr. Hackett felt rather bad about this, and I was a little bit angry. Well, that was about all there was to it. We left the office and he said that he would look it up and find out who was to blame. Yes, he handed me a telegram—returned

me one. I don't know whether it was the original or whether it was a copy, I am not certain. But he promised to take the matter up and I let it go at that, and he did later on. I think I gave the telegram that he handed me to Mr. Jones for safe keeping, or something. We took it with us. Yes, that was the telegram that was introduced in evidence, marked Plaintiff's Exhibit No. 1. That is the only one I know anything about, supposed to be a copy of the original. I afterwards gave it to my attorney in this suit. No, I am not clear on the point at this time whether it is the one Mr. Jones had or whether it was the original that Mr. Hackett had. The next occurrence that I recall with reference to this dispatch was, I was called into Mr. Jones' office and he showed me a letter that he had received from Mr. Hackett. That was a day or two later. I don't know whether it was the following day, but it was shortly after I had talked to Mr. Hackett. He said, "I have got a sixty-five cent check or draft here." And we decided we shouldn't accept it, to send that back. Yes, that was a letter that was introduced, marked Plaintiff's Exhibit No. 2, the letter from Mr. Hackett to Mr. Jones. I don't think Mr. Miller was in Boise at that time. No, I am quite satisfied he wasn't, because I would have seen him. Yes, I received a communication from the defendant at that time—an agent, or somebody in Salt Lake, an attorney or somebody from Salt Lake I think it was. I addressed a com-

munication to the defendant company, and I kept a copy of it. This was, I think, at the suggestion of Mr. Hackett, and set forth the case as well as I could to this attorney, I think it was, in Salt Lake.

A certain document was thereupon marked Plaintiff's Exhibit No. 4 for identification.

WITNESS: This is the original letter I addressed to the agent or the manager at Boise, for the attention of Mr. Hackett of the Western Union Company. That was done at the suggestion of Mr. Hackett, and I think he sent it on, at least I got a reply from Salt Lake City.

Thereupon, the paper marked Plaintiff's Exhibit No. 4 for identification was offered in evidence.

MR. MORROW: We would object to this, for any other purpose than that of showing that a claim in writing was made to the company on this date, and for the reason that a number of statements therein are self-serving, and further the general objection to the testimony relating to what the plaintiff would have done if he had received the telegram, the same objection that we made a few minutes ago to other testimony along that line.

THE COURT: Well, it will be received only for the purpose suggested.

MR. JOHNSON: Yes, it is only for the purpose of showing, Your Honor, that a claim in writing was made on that date.

MR. MORROW: Well, it is competent for that.

MR. JOHNSON: I will read it to the Court.

THE COURT: That is unnecessary. If you will just let me have it.

MR. JOHNSON: All right.

Plaintiff's Exhibit No. 4 was thereupon admitted in evidence, and is in words and figures as follows:

"Boise, Idaho, June 18, 1918.
"Western Union Telegraph Company,
"Boise, Idaho.
(Attention Mr. Hackett, Manager.)
"Gentlemen:

"After complete investigation, I find that on the 30th day of November, 1917, a telegram was addressed to me, properly directed to my address, 5767 Shafter Avenue, Oakland, California.

"The letter admised me of the opportunity to sell fifty (50) shares of my stock in the Idaho National Bank at a price of Ninety Dollars a share or a total of Four Thousand Five Hundred Dollars.

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me.

"It was sent to me by my associate and agent, Mr. T. J. Jones of Boise, Idaho.

"After being delivered to your Company the price of the telegram was paid by Mr. Jones for me, and instead of the telegram being sent it was pigeon holed in Boise, although on December 2, 1917, there being no response to Mr. Jones' inquiry, he sent his son to the tele-

graph office to ascertain whether the message had been sent, and Mr. Jones was informed by one of the employes of the office that the message had been delivered.

"Again, on December 3, 1917, Mr. Jones' son, Felix T. Jones, went to the office in Boise, Idaho, and inquired about the delivery of the message, and your employee specifically replied that the message had been sent and delivered to you on December 1, 1917.

"Whereupon Mr. Jones decided that I did not care to sell my stock, and the opportunity for selling it passed.

"I was not aware of the transmission of this telegram until my return to Boise, about the middle of February, 1918, at which time, in company with Mr. Jones and his son, we went to the Western Union office and there found that the message had never been sent to me, but was still in the office. Whereupon Mr. Hackett delivered to me the original message, which I now have in my possession.

"He also attempted to return the toll, and the next day sent your check No. 62 in the sum of Sixty-five cents. This check was refused and Mr. Jones returned it saying that he did not care in any way to waive any claims which might arise for damages.

"I now demand, by reason of your negligence, the sum of $4500.00, with interest thereon at the rate of seven per cent per annum from and after the 9th day of December, 1917. Unless this matter can be settled and adjusted I will be obliged to seek my remedy in the Court.

"Please address me c/o Overland National Bank, Boise, Idaho.

"Yours very truly,

(Signed) "J. A. CZIZEK."

WITNESS: Yes, I received a reply to that communication.

Thereupon an envelope was marked Plaintiff's hibit No. 5 for identification, and a letter was marked Plaintiff's Exhibit No. 6 for identification.

WITNESS: No. 5 is an envelope addressed to me from Salt Lake City, and contains this letter, Exhibit. No. 6, which seems to be a reply to my letter and is signed by U. G. Life, District Commercial Superintendent.

Thereupon, Plaintiff's Exhibits Nos. 5 and 6 for identification were offered in evidence.

MR. MORROW: I don't think it is material, but there is no particular objection. The objection rather goes to the weight of it.

Thereupon, these exhibits were admitted in evidence and were marked Plaintiff's Exhibit Nos. 5 and 6 respectively. Plaintiff's Exhibit No. 5 is an envelope upon which is printed, in the upper left hand corner, the return card of the Western Union Telegraph Company, Salt Lake City, and the name Mr. J. A. Czizek, Care Overland Natl. Bank, Boise, Idaho, is printed on the envelope, and a pencil line is drawn through the words Care Overland Natl. Bank,, Boise, Idaho, and the address, Warren, Idaho in pencil written in place thereof. Plaintiff's Exhibit No. 6 is in words and figures followng, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY
"Mountain Division"
"U. G. Life,
"District Commercial Superintendent.
"Salt Lake City, Utah, July 2, 1918.

"Mr. J. A. Czizek,
c o Overland National Bank,
"Boise, Idaho.
"Dear Sir:

"Acknowledging receipt your favor June 18 addressed this Company, Boise, Ida., making claim against the Company for $4500.00 alleged loss sustained by alleged failure in transmission message filed Nov. 30, 1917 addressed to yourself at Oakland, Cal., signed T. J. Jones: beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further.

"However, more than 60 days have elapsed since date claim message was filed, our investigation will be conducted without prejudice to the situation created by your failure to bring matter to our attention at an earlier date.

"Yours truly,
(Signed) "U. G. LIFE, Dist. Com'l Supt."

MR. JOHNSON: Here is a letter that perhaps should have come before the other two. I will ask that this letter be marked as Plaintiff's Exhibit 7.

Said letter was thereupon marked Plaintiff's Exhibit No. 7.

WITNESS: This paper marked Plaintiff's Exhibit No. 7 is a letter from Mr. Hackett that prompted the writing of that letter there, Plain-

tiff's Exhibit 4. That was received prior to my writing that letter, and was received by me.

Thereupon Plaintiff's Exhibit No. 7 was offered and received in evidence without objection, and is in words and figures following, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY

"Incorporated

"Manager's Office, Boise, Ida., June 19, 1918.

"J. A. Czizek,

"Boise, Idaho.

"Dear Sir:

"Your favor 18th instant received and I have forwarded same to our Company for consideration. Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?

Yours truly,

(Signed) "G. H. HACKETT, Manager."

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: On November 30th, 1917, about that time, this blank stock was in Oakland. It was in the Bank of Italy. It was there with other collateral at the time, for a loan. No, not the Bank of Italy in San Francisco, in Oakland. Well, I beg your pardon, at that time that was the Security Bank. It is now a branch of the Bank of Italy, taken over by the Bank of Italy since. It was then known as the Security Bank.

RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: Yes, sir, at that time this bank stock that I owned in the Idaho National was available to me to sell. I was in a position to deliver the stock at any time.

Yes, I could have obtained it from the bank.

RE-CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Yes, I know what the time for a letter between Oakland and Boise is. The ordinary time of sending a letter. A letter leaving Oakland to Boise should arrive here in 48 hours without any trouble, probably less. The train leaves Oakland at 10 o'clock in the morning and you are here the following morning by 4 o'clock, the second morning.

(Witness excused.)

FELIX T. JONES, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is Felix T. Jones, my age 27, my residence Boise City, Idaho, my occupation is attorney. I am at present holding the position of police judge with the City. I am a son of T. J. Jones, and was his former law partner. I

am acquainted with one David Miller. I was present at a conversation in the latter part of November, 1917, at the Idaho National Bank, at which my father and Mr. Miller were present. At the time, they were speaking of the stock, speaking of 65 share of stock, and at that time Mr. Miller made an offer of $85.00 per share for the stock, which was refused. Mr. Miller made the statement that he had bought other stock at a cheaper price, and that was about the substance of the conversation. His offer was refused. I was in my father's office on or about the 30th of November, 1917, in the afternoon or towards evening. I was up there alone, and my father came in presently with two telegrams, that is it was two messages, two duplicate messages, and requested that I take it over and send it to J. A. Czizek. He told me to take the money out of the safe and send the message to Czizek.

(Witness handed paper marked Plaintiff's Exhibit No. 1.)

WITNESS: That was one of the messages. I can't say whether that is the original or one of the duplicates. It is one of the telegrams. I took it down to the telegraph office and gave it to the operator. I asked him what the charges would be, and he stated that the charge was sixty-five cents. I told him to send the message to J. A. Czizek at Oakland. I prepaid it. The message was stamped, or I think the first one I gave the message to was

May Eagan—of that I am not positive—I think I gave the message to May Eagan. Her name is now May Russell. She was the girl behind the desk. And she was the person I gave the message to. I left it with her, prepaid the charges, and left. I then came back to the office. After leaving the telegram there I came back to our office in the Yates Building. At the request of my father, I went to the telegraph office, I believe, on the first of December, which I think was a Saturday, and asked if there was a message there for Jones. She said no, and then I asked her if they had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland.

MR. MORROW: Just a moment. We object to any further testimony from this witness regarding the conversation that he had with the employes of the company, for the reason that there is an attempt apparently in the complaint to lay a basis for an action of deceit. In paragraphs 7 and 8 it is alleged in substance that the present witness, at the request of his father, made several inquiries at the office as to whether the message had been sent, and was informed that the message had been sent, and that the said T. J. Jones relied upon and believed those statements. Now, if those allegations are material for any purpose it would be as laying a foundation for an action on the ground of deceit, and the fundamentals of that action are not alleged, particularly there is no allegation of any intent to

deceive, and there is no allegation that the employe making any representations concerning that telegram can or ought to have known the facts, and there is no showing of any authority by any employe to make representations concerning the delivery of a telegram, unless in case the sender asks for a report of delivery, which was not done in this case. In that event, under the rules of the company, the receiving office would wire back that it was delivered. But if counsel is seeking to put this in for the purpose of showing the essentials of an action for deceit we think his complaint is radically defective, because he hasn't pleaded it on that theory, and he hasn't pleaded either that there was any intent to deceive, or that there was any knowledge of the falsity of any representation that has been made, and I don't think it is necessary to cite authority upon the point that there is no liability for mere innocent misrepresentations.

MR. JOHNSON: If Your Honor please, it goes to the question of the negligence of the company, it seems to me.

THE COURT: No, the negligence is in not delivering the message.

MR. JOHNSON: Well, also in the employes of the company informing him that it had been delivered, so as not to make it necessary, or to show that the plaintiff was not negligent, that is, Mr. Jones, in not communicating further with him.

THE COURT: Well, for that purpose it may go in.

To which ruling defendant was allowed an exception by the Court.

WITNESS: She looked through some papers and files, and said the telegram had been sent. Well, Sunday came in and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked out. I was present at my father's office after that time, when a conversation took place between my father and David Miller with reference to this stock. Miller came up to the office and asked if we had heard from Czizek. I think that was about ten or ten-thirty in the morning, I think about that time. That would be the fourth. And asked if we had heard from Czizek, to which we replied no, and then he stated that he doubted, that he considered, that he thought we were holding the Czizek stock up, in other words, that he thought we had the 65 shares of stock at

that time, and we told him no, and then he questioned us as to whether we had sent the message or not, and that was about all the conversation.

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: If Czizek answered the telegram, I suppose Czizek would have sent the telegram to T. J. Jones. I don't remember whether the clerk made any inquiry or any notation upon the telegram.

(Defendant's Exhibit A handed to witness.)

WITNESS: The telegram which I hold in my hand at the present time, I believe, is the one that I gave to the operator, because these letters here, "454 Yates B." and the "408-W", that is not my writing. It is not my father's writing. I can't say in this particular message—I don't remember whether the clerk asked about our telephone number, but it is customary when you take a message there as a rule, that they usually put your address, and put a scroll around it. I don't think it makes any difference whether you ask for an answer or not. I am not a customer in the office to any great extent, but I don't think that makes any difference. Now, as to this conversation that I had at the telegraph office after the telegram had been sent—there was a conversation on a Saturday. The first conversation was on the first, almost twenty-four hours had elapsed. Then the second conversation—

yes, the telegram was sent on the 30th. I went there first on the 30th and then again on the first, which was almost twenty-four hours after I had taken the telegram down and given it to them to be sent to Czizek. Yes, that would be some time Saturday afternoon. The exact wording of the first statement that was made to me was that the message had been sent to Czizek. Yes, that the message had been sent to Czizek. The way the question was worded, there is no question in my mind, the way they put it, that they told me, that they gave me to understand, that Czizek had received the telegram. As near as I can recall the exact language, that was the exact language, that J. A. Czizek of Oakland had received the telegram. That is the exact language as near as I cal recall. Yes, I paid the charge of sixty-five cents.

(Witness excused.)

The Court took a recess until 2 o'clock P. M.

2 P. M. Saturday, February 28, 1920.

By permission of the Court, J. A. Czizek, the plaintiff, was recalled for further examination and testified as follows:

DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: Yes, sir, I stated that I am still the owner of the fifty shares of bank stock of the Idaho National Bank referred to in the complaint. Well,

with reference to disposing of the stock after the middle of February, 1918, when I first learned that this telegram had been sent, I heard a great deal about the plan to merge, and the value of the stock to me seemed to be dependent on selling it, and there was at that time—Mr. Miller wasn't here, and I heard it had fallen through, that his merger plan had fallen through, or whatever they had in view. I don't know as to the details of that, but Mr. Jones and I discussed it a great deal, and he seemed to think there was nothing more to be done about that merger and I didn't look for the sale of it in that direction, and I didn't know where there was a market for it. In fact, I didn't attempt to sell it to anyone else at that time. Well, I didn't know anything of its value other than on one or two occasions I asked Mr. Streeter, who was the cashier, what he thought it was worth. I will venture the statement that I asked him two or three times, but he wouldn't fix it. In fact, his statements to me were very discouraging as to its value. Some time following that time I went to the mine, and I received, I think, a notice to attend a meeting, for the purpore of liquidating, (the bank) or something of that kind. I just can't recall what that notice was or how it read, but I didn't pay much attention to it; I was busy, but later I learned that they were liquidating, and it was in the Overland National. After that time I

knew of no market for the stock. I doubt whether there was any.

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: No, I don't think I attempted to sell the stock to anyone else after I came back in February. Mr. Miller I don't think was there. I didn't see him until June of that year. I went home, and he telegraphed me at Oakland, and I met him at Salt Lake by appointment on entirely another matter. In fact, the matter pertained to the purchase of mining interests that he had. I came here to Boise with him for the purpose of consummating that deal. I did not make any further attempt to sell the stock. In fact, I have never made any attempt to sell the stock, prior to Mr. Miller, and told Mr. Fletcher prior to his death that I would like to dispose of it when I left Idaho.

RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: No, I know nothing regarding its value or whether I could have sold it or whether it had any market value. I was rather discouraged on the showing that the books seemed to make, and that Mr. Streeter gave me. I depended on what he told me. Yes, I made some investigations with a view to ascertaining its value. I think I

went to Mr. Streeter once or twice. In fact, I used to discuss these things with him every once in a while.

(Witness excused.)

H. L. STREETER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is H. L. Streeter. I reside in Boise. I was connected with the Idaho National Bank as cashier from October 1st, 1917, until the present time. I am still acting in that capacity, and as such I have charge of the books and records of the bank. I have with me a portion of the individual ledger that will show the balance of David Miller in the bank at the close of business on November 30th, 1917. Mr. Miller's balance in the Idaho National Bank at the close of business on November 30th, 1917, was $84,003.57. His balance at the close of business on December 1, 1917, was $33,943.11. His balance at the close of business on Monday, December 3rd, 1917, was $30,826.50. And his balance in that bank at the close of business on December 4, 1917, was $30,818.41. I was acquainted wth David Miller to a certain extent. He occupied the position of vice president in that bank at that time. Well, yes, he had purchased stock in

the bank prior to that time. He was a stockholder in the bank when I went in. I have the stock ledger here, which would show the stock purchased by Mr. Miller in the bank on various dates, and which would show the date that the certificates were transferred and recorded. The record shows that on May 25, 1917, certificate No. 106 was issued for 10 shares. Yes, these are certificates that were issued to David Miller. June 25, certificate No. 107 for 50 shares. On the same date, certificate No. 108 for 50; 109, for 50; 110, for 25; 111, for 25. On October 25, certificate No. 114, for 265 shares. November 30, certificate No. 119, for 265 shares. December 10, certificate No. 121, for 50 shares. That is the last certificate that was issued to Mr. Miller. These were all in 1917. The total capital of the bank was $100,000, and the par value was $100.00. Since the 14th of February, 1918, I don't think there were any transfers of stock in the Idaho National Bank. I don't think there have been any transfers since then. The book doesn't show any that I recall. The Idaho National Bank still has its charter but there is nothing being done but collecting the assets and paying off the liabilities. It is practically in process of liquidation, and I have charge of those affairs. Well, in my judgment, from my knowledge of the affairs of the bank, the value to the stockholders of the stock in the bank at the present time is purely an estimate, but I doubt if there will be anything left for the

stockholders after the liabilities are paid. Well, I should judge that that has been practically the condition of the bank since the middle of February, 1918.

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Yes, I said that on the 10th of December, 1917, certificate No. 121 was issued to Mr. Miller for 50 shares. On December 10th, 1917, it shows that certificate No. 109 was cancelled for 50 shares. There is no such certificate that shows the transfer of the 15 shares that stood in the name of T. J. Jones, to Mr. Miller. That is, no certificate issued to Mr. Miller for 15 shares. The record shows that certificates held or issued to T. J. Jones were cancelled on December 6th, 1917. Three certificates of five shares each, Nos. 4, 55 and 62, for five shares each. On December 6, 1917.

The balance in favor of Mr. Miller on the 28th of November, 1917, at the close of business, was $1245.95. Yes, on the 30th of November there were some considerable deposits to Mr. Miller's credit. The items are as follows: an item of $294.40; an item of $130,000.00; an item of $750.00. On the 1st of December, the deposits there to Mr. Miller's credit were $164.60; $440.00; $20,000.00. And the balance at the close of business on that day, December 1st, was $33,943.11. At the close of business on the 5th of December, Mr. Miller's account shows an overdraft of $20,978.76.

The deposits in Mr. Miller's account on the 6th of December, 1917, show $147.10; $3,000.00; $20,000.00, and the balance in his account on the 6th of December at the close of business was $1,212.77. At the first of that day, he had an overdraft of $21,787.23, and the balance at the close of business was $1,212.77. From the 6th to the 10th of December, the maximum balance in his account on any of those days was $952.69. On February 5th he had a balance of $1353.41, and on March 1st he had a balance of $1264.81. Those are the maximum balances during that period.

(Witness excused.)

NELLIE M. WILSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is Nellie M. Wilson, I reside in Boise, and was formerly an employe of the Idaho National Bank. I was employed in the capacity of stenographer and bookkeeper. I was connected with the bank ten years and eleven months. I was employed at the bank in November, 1917. I was acquainted with David Miller. He was vice president of the bank. I am acquainted with Mr. T. J. Jones. I was in the bank on or about the 30th of November, 1917, after the banking hours, when Mr. Miller and Mr. Jones were there. I was work-

ing on the books one evening when Mr. Jones came back and asked me if I would write a telegram for him and I told him I would, and I got the blank and sat down at the typewriter. I think that Plaintiff's Exhibit No. 1 is one of the telegrams that I typed. It is the same contents.

Q. What did you do with them after you had typed them?

THE COURT: Do you think that is important, to go over that?

MR. JOHNSON: It was merely leading up to some information that Mr. Miller wanted. I don't know that it is very material, any more than to show that Mr. Miller was very anxious to have the telegram go, and that he afterwards asked her if it was sent, etc., to show that he was personally interested.

THE COURT: All right.

WITNESS: Yes, as I remember, Mr. Jones took the telegrams and went out of the bank with them. Yes, after that I had a talk with Mr. Miller with reference to these telegrams. He came in a little later and asked me if Mr. Jones had written a telegram to Mr. Czizek, and if it had been sent.

(Witness excused.)

L. C. FLORA, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

WITNESS: My name is L. C. Flora. At the present time I am local manager of the Boise office of the Western Union. I am acquainted with Mr. Life, in Salt Lake. He occupies the position of district commercial superintendent, and has jurisdiction over this territory at Boise. If a claim as presented to me for damages growing out of the sending of telegrams, if it comes within a certain amount, managers investigate the claims and pay them locally, that is for sums, certain sums. If they are more than that, the facts are gathered locally and turned over to the district commercial superintendent, who has greater authority in the matter of the settlement of them. In amounts of $25.00 or over, I send them to the district manager in Salt Lake. These are the instructions that I have from the company.

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Mr. G. H. Hackett was my predecessor as local manager. I can't say positively whether his authority with regard to claims was the same as mine or not, because of the fact that the routine in that respect has been changed slightly, and I believe that it is since 1917. They were approximately the same as my instructions. I have been local manager since November 9, 1918. As best I can remember, this change of the rules was

made some time in 1917. It was simply raising the authority, however, for the office. Yes, for the local office. It was previously, I believe, $10.00. I have been with the Western Union Company about fifteen years.

RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: I know the instructions that I had, which were naturally general, and which covered amounts up to $10.00 for offices of this size. No, I wasn't here at the time Mr. Hackett was manager. I have no direct knowledge of what his instructions and authority were other than our rules are universal. Of course, as regards specific authority I don't know. Yes, the rules of all of the local managers throughout the country are practically the same.

(Witness excused.)

Plaintiff rests.

Thereupon the following evidence was offered on behalf of defendant:

MR. MORROW: We offer Defendant's Exhibit No. A in evidence, being a telegram identified by two witnesses on cross-examination. There being no objection said telegram was admitted in evidence and is identical in words and figures with the telegram set out in the special findings of fact herein.

Thereupon a certain paper was marked Defendant's Exhibit B and offered in evidence consisting of a copy of the telegraph blank of defendant certified by the Secretary of the Interstate Commerce Commission, and the same was admitted in evidence over Plaintiff's objection. Said Exhibit No. B is identical with the telegraph blank set forth in the special findings of fact herein and with the form of blank introduced in evidence as plaintiff's Exhibit No. 1 and defendant's Exhibit No. 8, except for the certificate which is as follows:

'Interstate Commerce Commission,
"Washington.

"I, GEORGE B. McGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of form received on February 20, 1917, from the Western Union Telegraph Company and now on file with the Interstate Commerce Commission.

"In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Commission this 12th day of March, A. D., 1919.

(Signed) "GEORGE B. McGINTY,
(Seal) "Secretary of the Interstate Commerce Commission."

Thereupon a certain paper was marked defendant's Exhibit No. C and the following occurred:

MR. MORROW: We offer in evidence as Defendant's Exhibit No. 3, certified copy, certified by the Secretary of the Interstate Commerce Commission, of certain rules of the company on file with the commission, being rules No. 1, 5, 9, and 29.

This certified copy contains certain other rules also that are in no way material.

MR. JOHNSON: Are those the same rules that are on this telegraph blank?

MR. MOIROW: They are the rules of the company on file.

MR. RICHARDS: That telegraph blank is identical with the one which you introduced.

MR. JOHNSON: Oh, it is?

MR. MORROW: Yes, it is. It was merely offered for that purpose, to show that the blank on which the telegram was sent was identical with the blank on file.

MR. JOHNSON: Let the record show that plaintiff objects to it, on the ground that it is not shown that these rules and regulations were brought to the attention of the plaintiff in this suit, and the plaintiff in the suit was not a party to the contract, and did not file the telegram, and is not bound by the rules.

MR. MORROW: I assume, Your Honor, that the question as to the effect of those rules not having been brought to the plaintiff's attention is one of the matters that will have to be discussed on the final argument. If the Court has any doubt on the matter—

THE COURT: It may go in, subject to the objection.

The Court afterwards overruled the objection and admitted the said rules in evidence.

The portion of said Exhibit No. C offered in evidence is as follows:

Rule 1.

MESSAGES TO BE ON MESSAGE FORMS, AND DATED FROM THE PLACE WHERE FILED WITH THIS COMPANY.

(a) Each message for transmission shall be written upon the form provided by the company for that purpose, or shall be attached to such form by the sender, or his agent, so as to leave the printed heading in full view above the message.

(b) Every message filed for transmission at an office or agency of this company shall show as its point of origin the name of the city or town where such office or agency is located, and shall show the date when it is filed with this company, with the exceptions shown in paragraphs (c), (d) and (e) of this rule.

(c) A message from a point listed in the Tariff Book of this company as a three-star or four-star point, telephoned by the sender to this company's office at the transfer point designated in the Tariff Book, for transmission, shall show as its point of origin the name of the city or town from which it is telephoned. Existing practices governing the acceptance of messages telephoned by the sender from a point where this company has an office or agency, at a time when such office or agency is closed, may be continued in force until otherwise ordered.

(d) A message originating at a point on a connecting telegraph line at which there is no

Western Union office and transferred to the lines of this company at the transfer point designated in the Tariff Book of this company, shall show as its point of origin and as its date the name of the city or town where, and the date when, it was originally filed with the connecting company and need not show the name of the place where or the date when it is filed with this company.

(e) A message originating with another telegraph company at a three-star or four-star point in connection with which a transfer point preceded by the letter Z is shown in the Tariff Book of this company, and transferred to this company at the Z transfer point, shall show as its point of origin the name of the city or town where it was filed with the other telegraph company, preceded by the letter Z, and as its date the date it was filed with the other telegraph company, and need not show the name of the place where or the date when it is filed with this company.

(f) No message received by this company for transmission shall bear a point of origin or date otherwise than in accordance with the foregoing.

NOTE: For instructions governing the forwarding of messages, see Rule 8.

Rule 5.
REQUEST TO REPORT DELIERY.—SPECIAL DELIVERY.—REPEATED MESSAGES.

(a) If the sender requests a report of delivery the words "Report delivery" will be placed in the check. (See Rules 4 (e); 32 (e).

(b) A message to be specially delivered beyond the free delivery limits of the terminal office, and for which the delivery charge is not given in the Tariff Book, will be accepted upon

the payment or guarantee of an amount sufficient to cover the message tolls and the probable cost of delivery, and will carry in the check the words, "Deliver and report charges," when they are to be paid by the sender, or the words, "Delivery guaranteed," when they are to be paid by the addressee. (See Rules 4 (e); 35, 37.)

(c) If the sender requests a repetition of his message, the words "Repeat back" will be placed in the check, and an additional charge of one-half of the regular rate on the message will be made. (See Rules 4 (e); 29.)

Rule 9.

NO PROMISE AS TO TRANSMISSION OR DELIVERY.

Do not make any promise respecting the transmission or delivery of a message.

Rule 29.

TRANSMISSION OF REPEATED MESSAGES.

(a) Observe special care in sending or receiving a message requiring repetition and bearing in the check the indication, "Repeat Back."

(b) Repeat back such messages at each stage of transmission from point of origin to destination.

(c) Make careful comparison with the original as the message is repeated back, underlining or checking each word and, if found to be correct, write across the face of the message the words, "Repeated back O. K." followed by the signals of both operators.

INTERSTATE COMMERCE COMMISSION.
Washington.

I, GEORGE B. McGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION,

do hereby certify that the attached are true copies of pages 246, 247, 248, and 253, of the Western Union Telegraph Company Tariff Book, 1917, received March 12, 1917, from the Western Union Telegraph Company, and that said tariff book was on November 30, 1917, and is now on file with the Interstate Commerce Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 11th day of December, A. D., 1919.

(SEAL)

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

L. C. FLORA, heretofore duly sworn, upon being recalled on behalf of defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Morrow:

WITNESS: In the business of defendant company, we have several different classes of messages. They are the repeated, the unrepeated and the valued messages.

Q. Now state what the method of handling the repeated and unrepeated telegrams is, in your office.

A. An unrepeated telegram—

MR. JOHNSON: I would like to simply interpose an objection there, and object to it as incompetent, irrelevant and immaterial, and not binding

upon the plaintiff in this case. It has nothing to do with the issues raised in the pleadings in the case.

The objection was overruled and the witness continued as follows:

An unrepeated telegram is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic time clock, and hung on the hook provided for that purpose, to take its turn with other telegrams. While a repeated telegram is given the same handling up to the point that it is given directly to the operator for transmission, and not hung on a hook with the average class of unrepeated messages. A valued telegram is handled likewise. A repeated or valued message is retained with other telegrams and filed away as other telegrams are filed. The handling of it, seeing that it is handled and repeating back of it, is the only material difference in the handling given. It is first, as I have just said, turned over to the operator for transmission. It is transmitted to the distant point or other relay point, and then repeated back for accuracy to the sending or originating office. The notation made on the face of a repeated telegram is "Repeated back, O. K.", by the operator's initials who has handled the message. That is after it has been sent. Prior to sending, the words "Repeat back", are placed on the face of the telegram. To see whether it has been repeated or not,

the sending marks are observed, and the initials by the clerk handling that, to insure that it has been transmitted and properly repeated back.

CROSS EXAMINATION.

By Mr. Johnson:

WITNESS: The first thing done with an unrepeated message is, it is first counted, initialed by the clerk, that is, his or her initials put on the face of the telegram to identify who has handled it. That is usually placed in the upper right hand corner. The difference between the handling of an unrepeated message and a repeated message, it is counted first, and the two words, "Repeat back", are written immediately after the check. You will note there in the column check. And the two words "Repeat back" follow that naturally. The first thing that is done with either telegram, is to count them. That is the case with both the repeated and the unrepeated. Then the clerk initials and times it. That is the case with both of them up to that point.

Defendant's Exhibit No. A was handed to the witness.

WITNESS: It has an initial there. You will note the intials "M. B.", perhaps, or "M. Z.", whatever they are, anyway. That would indicate the clerk's initials who handled the message. Yes, that it was received by the clerk and initialed by her. The other writing is forty-nine, paid N. L., which

indicates night letter, as is indicated on the left hand corner.

(Witness excused.)

Thereupon the following stipulation was marked Defendant's Exhibit No. A on the second trial and introduced in evidence:

(Title of Court and Cause.)

STIPULATION AS TO THE TESTIMONY OF G. H. HACKETT.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that G. H. Hackett, a witness on behalf of the defendant in said cause, if called and sworn as a witness in this action, would testify as herein set forth. This stipulation is made with the right reserved to the plaintiff herein to object to all of said evidence, or any part thereof, upon any legal ground to be stated at the time of the trial thereof. Subject to said reservation, it is stipulated that said witness would testify as follows:

I was the local manager of the Western Union Telegraph Company at the office in Boise, Idaho, on November 30, 1917, and remained in such position until about the month of October, 1918. I now reside near Los Angeles, California, and have not since been connected in any way with the telegraph company. As such manager I had general supervision of the entire office. In respect to the settlement of claims against the company for damages,

I had no authority to settle or adjust any claims beyond the sum of $25.00. All claims in excess of that amount were referred to the District Commercial Superintendent of the Western Union Telegraph Company for the division in which Boise is situated. The Superintendent at that time was Mr. U. G. Life, of Salt Lake City.

I had no knowledge of the filing of the message involved in this action, nor of the fact that it had been misplaced or that it failed of transmission, until about the middle of February, 1918. Mr. Czizek and his attorney, Mr. T. J. Jones, called upon me at my office at that time with a copy of the message and claimed that it had never been delivered. I told them I had no knowledge of the message at all but that I would look into the matter and ascertain if any such message had been filed and whether it had been transmitted. Mr. Czizek and Mr. Jones left the office. I then either made search personally or directed search to be made to ascertain if such message had been filed with the company, and found that no such message was in the day's business for November 30th, 1917. All messages filed with the company each day are, at the close of the business for that day, checked over to ascertain whether they have been properly transmitted. This fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it which includes the initials of the operator sending the same and

the time when the same is transmitted. After this check is made, the messages for the particular day are bound together and tied with a string and laid away for future reference. After we failed to find the message in suit among the messages filed with the Company on November 30, 1917, where it should have been found, examination was made of the files of messages for previous days and the Czizek message was found in one of these earlier files. It bore the initials of the clerk, Margaret Brown, who received the message from the sender at the counter, but had no operator's check on the same, indicating that it had been transmitted, and no perforation showing that it had ever been placed upon the operator's hook for transmission. The duties of the clerk who receives the message after endorsing her own initials and the filing time thereon, and the amount of the toll, is to place the message upon the operator's receiving hook for transmission.

(Portion stricken out on motion as shown below).

Repeated messages are handled in the same way by the receiving clerk, that is to say, they are checked in the same manner and placed upon the operator's hook for transmission, but in addition to the other checks the words "REPEATED BACK Two Extra" are stamped or endorsed upon the face of the message, which indicates to the operator that the message is to be handled as a repeated

message. The clerk, Margaret Brown, was a careful, capable and efficient employe.

I have heard read the testimony of Mr. Felix Jones that he inquired of the Western Union office in Boise on one or more occasions after November 30th about the delivery of the message to Mr. Czizek and was informed that it had been delivered, and in respect thereto have only to say that I was not present at any such conference and cannot deny it except to state that we have had no way of knowing when an unrepeated message has been delivered, and no clerk had any authority to make any such statement, but that the standing instructions given to all clerk in respect to inquiries concerning messages is to state that we assume a message has been delivered, if we do not hear from it to the contrary. As this message was not transmitted, we, of course, would receive no report upon it.

Some time after the letter from Mr. Jones of February 18, 1918, returning the check for 65c had been received by me, I went to Mr. Jones' office and told him I would like to ask him some questions about the Czizek telegram. I must have gone there under directions from the District Commercial Superintendent to ascertain the facts concerning the claim for damages. It was part of my general duty to make a report to the District Commercial Superintendent of the facts concerning all claims, and I remember asking Mr. Jones some questions

about the value of the stock, but I deny that I made any statement that the company would settle the claim or that there was no question about the company's liability, or used any words to that effect. I made no statement as to the amount that Czizek would be entitled to, or that he would be entitled to anything. I had no authority to determine what the company would do with respect to the claim, but it was my duty to report the facts as fully as I could ascertain them. I wrote a letter to Mr. Jones returning the toll paid on this message which letter is an exhibit in this case.

Dated this 17th day of February, 1922.

RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Plaintiff.
RICHARDS & HAGA,
Attorneys for Defendant.

Thereupon it was agreed in open court by the attorneys for the respective parties that it was intended to stipulate that the facts stated by he witness should be considered in evidence the same as if the witness were present and testified, and the same agreement was made as to the stipulation as to the testimony of Mrs. Margaret Holland, set forth below.

Mr. Johnson, after making a statement as to his theory of the proper procedure on the new trial herein, made the following objection to the entire stipulation.

I desire to object to the entire testimony of Mr. Hackett on the ground that it is cumulative. There is no reason shown why it could not have been produced on the former trial,—and on the further ground that in view of the decision of the Appellate Court, it is not proper for new or additional evidence to be introduced in this case at this time, but the matter should be determined upon the records as already taken.

THE COURT: I hardly know why they should have directed a new trial. I remember being somewhat in doubt as to what the Court expected of this Court, but suppose you hadn't stipulated waiving a jury, where would we be? It seems to me we would have to try the case *de novo*.

MR. JOHNSON: It looks that way, Your Honor.

THE COURT: So I think I shall have to overrule the objection. If there is any doubt I think it ought to be resolved that way, so as not to make it necessary to have the case come down here again. If I am receiving evidence which should not be received, of course the Appellate Court can rectify the error very easily.

MR. JOHNSON: The next objection, Your Honor, is on page 3, this portion of Mr. Hackett's testimony beginning about ten lines from the top: "I cannot account for the fact that this message was found in one of the old files instead of in the

file of messages for that day, except that the clerk who received the same must, at the time she received this message, have been examining the file of the former day's messages, and the message in suit in this way was inadvertently mis-filed among the messages in the old file and overlooked."

Your Honor, we desire to object to that portion of it and move that it be stricken out on the ground that it is incompetent, irrelevant and immaterial, in that it consists entirely of surmise and conjecture or opinion of the witness and does not state facts of any testimony of any evidential value. In support of that objection—

THE COURT: You need not discuss it. I will hear from the other side.

MR. MORROW: The only point I would suggest is that in connection with the next statement: "This is the only way the message could have escaped the check which was made at the close of business each day and which is made to ascertain if all messages have been properly transmitted." It seems to me that shows what he bases his statement upon and to that extent it is admissible, particularly in view of the decision of the Appellate Court, which stressed at several places the fact that this was a case of utter failure to transmit a telegram, without attempting any explanation or excuse. And the other portion, the previous portion of the testimony shows where it was found, and this is simply

the explanation, with his statement that that is the only possible way it could have been misplaced.

THE COURT: I can't see that it will cut very much figure either way, but you can indulge the conjecture just as well as Mr. Hackett could, in your argument, if he has only stated the facts as to the mode of transacting business and the way of checking, etcetera, you can discuss that; the motion is allowed.

To which ruling defendant was allowed an exception by the Court.

MR. JOHNSON: We desire to object to the next sentence, "This is the only way the message could have escaped the check which was made at the close of business each day, and which is made to ascertain if all messages have been properly transmitted." I object to that upon the same ground, because that shows on its face that it is merely a conclusion; it shows also that it isn't the only conclusion that could be reached from the facts.

THE COURT: The objection is sustained.

To which ruling the defendant was allowed an exception by the Court.

MR. JOHNSON: If Your Honor please, I desire to move to strike out, beginning with the last paragraph on page 3: "I have heard read the testimony of Mr. Felix Jones that he inquired of the Western Union office in Boise on one occasion after November 30th, after the delivery of the message to

Mr. Czizek, and was informed that it had been delivered, and in respect thereto have only to say that I was not present at any such conference and cannot deny it except to state that we have had no way of knowing when an unrepeated message has been delivered, and no clerk had any authority to make any such statement, but that the standing instructions given to all clerks in respect to inquiries concerning messages is to state that we assume a message has been delivered, if we do not hear from it to the contrary. As this message was not transmitted, we, of course, would receive no report upon it."

Portions of that possibly may be competent, but we object to the first part of it, on page 3, in which he states he was not present at any such conference and cannot deny it, we move that that be stricken out.

THE COURT: That motion is denied.

MR. JOHNSON: Then we move that the remainder of the paragraph be stricken.

THE COURT: Denied.

Thereupon the following stipulation was marked Defendant's Exhibit B on the second trial and introduced in evidence:

(Title of Court and Cause.)

STIPULATION AS TO TESTIMONY OF MRS. MARGARET HOLLAND.

IT IS HEREBY STIPULATED by and between

the parties to the above entitled action that Mrs. Margaret Holland, a witness on behalf of the defendant in said cause, if called and sworn as a witness in this action would testify as hereinafter set forth, but this stipulation is made with the right reserved to the plaintiff herein to object to all of said evidence or any part thereof upon any legal ground to be stated at the time of the trial herein. Subject to said reservation it is stipulated that said witness would testify as follows:

My name is Mrs. Margaret Holland, residence, Ontario, Oregon.

My maiden name was Margaret Brown.

I entered the employ of the Western Union Telegraph Company in October, 1917, at Boise, Idaho, as counter clerk.

I was with the Company in November, 1917, as counter clerk. I do not remember anything regarding the nature of the message from T. J. Jones to J. A. Czizek at Oakland, California, nor do I recall the circumstances of its delivery to the Western Union Office.

I was in the office at the time the message was located and know that it was found in a file with back-date business which had been placed in the Company files prior to the date of the Jones message. It was marked with my initials as counter receiving clerk.

(Portion stricken out on motion as shown below.)

I do not know Felix Jones and do not remember having any conversation with him at any time, and in fact I remember no one coming to me at any time concerning the message.

Dated this 17th day of February, 1922.

RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Plaintiff.
RICHARDS & HAGA,
Attorneys for Defendant.

MR. JOHNSON: If Your Honor please, I desire to object to this testimony of Mrs. Holland's, the entire testimony, on the same ground as we object to the testimony of Mr. Hackett.

THE COURT: Overruled.

MR. JOHNSON: I desire to object to the following specific part of her testimony, found on page 2, consisting of the following statement: "I can account for this in only one way. I must have been looking up a service message at the time the Czizek message was handed me, and assume that I mislaid the Czizek message with the back day's business." We object to that upon the same ground upon which we objected to a similar statement in Mr. Hackett's statement.

THE COURT: Sustained.

To which last mentioned ruling defendant was allowed an exception by the Court.

MR. MORROW: With the understanding previously announced that in connection with the transcript all exhibits introduced in the former trial are considered in the case, we rest.

Whereupon the defendant through its counsel made the following request in writing for declarations of law:

(Title of Court and Cause.)

REQUEST FOR DECLARATIONS OF LAW.

COMES NOW, the defendant above named and at the conclusions of the evidence in the above cause, and before the close of the trial therein, respectfully requests this honorable Court to make the following declarations of law, to-wit:

1. That upon all the evidence the decision of the Court should be in favor of defendant.

2. That upon all the evidence the defendant has not been shown to be guilty of gross negligence in failing to transmit and deliver the telegraph message involved in this action.

RICHARDS & HAGA,
Attorneys for Defendant.

Which request was denied as to each of the requested declarations of law and an exception was allowed to the defendant to such action by the Court.

Whereupon defendant through its counsel made a request in writing for special findings of fact,

which the Court stated would be allowed if the points upon which special findings were desired were indicated by counsel, and such request having been made before judgment, special findings of fact were accordingly entered herein.

The foregoing constitutes in substance all of the evidence, oral and documentary introduced at said trial and all stipulations filed and proceedings had therein and is hereby duly settled and allowed as defendant's Bill of Exceptions.

FRANK S. DIETRICH,
Judge.

May 25, 1922.

Endorsed:

Lodged May 8, 1922.
Filed May 25, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR.

AND NOW COMES Western Union Telegraph Company, a corporation, defendant herein, and says that on the 11th day of March, 1922, this Court entered judgment herein in favor of plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the manifest prejudice of this defendant, all of which ap-

pears more fully and in detail from the assignment of errors filed with this petition.

WHEREFORE, This defendant prays that a writ or error may be allowed to it from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Idaho, Southern Division, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers upon which said judgment was passed, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and this defendant desiring to supersede the execution of such judgment, herewith tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of said writ of error a supersedeas may issue.

Dated at Boise, Idaho, this 17th day of May, 1922.

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Defendant.

ORDER ALLOWING WRIT.

AND NOW, To-wit, on the 19th day of May, 1922, it is hereby ordered that the above and foregoing petition for writ of error is hereby granted, and said writ allowed as prayed for, the same to operate as a sepersedeas upon the defendant filing a bond in the sum of Eight Thousand Dollars

($8000.00) with sufficient sureties to be conditioned as required by law.

(Signed) FRANK S. DIETRICH,
District Judge.

Endorsed:
Filed May 19, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

AND NOW COMES The defendant in the above entitled action, Western Union Telegraph Company, by its attorneys, and in connection with its petition for writ of error herein says that there is manifest error in the record, proceedings and judgment herein, and in particular assigns the following errors:

1. That the Court erred in entering judgment in favor of plaintiff and against this defendant for the sum of $5663.35 and costs.

2. That the special findings of fact made herein by the District Court are insufficient to support the judgment entered.

3. That the Court erred in refusing defendant's request for a declaration of law to the effect that upon all the evidence defendant had not been shown to have been guilty of gross negligence in failing to transmit and deliver the telegraph message involved in this action.

4. That the Court erred in refusing defendant's request for a declaration of law to the effect that upon all the evidence the decision of the Court should be in favor of the defendant.

5. That the Court erred in holding, adjudging and deciding that the defensive provisions indorsed on the telegram as shown by special finding No. V were inapplicable because the telegram was not transmitted at all, or were inapplicable for any reason.

6. That the Court erred in adjudging and deciding that plaintiff was entitled to recover judgment against defendant notwithstanding the finding that the message in question was an unrepeated telegram sent subject to the provisions on the blank set forth in subdivision 1 of special finding No. V.

7. That the Court erred in adjudging and deciding that plaintiff was entitled to recover from defendant more than the sum of $50.00, notwithstanding the finding that the telegram was not specially valued but was only valued at $50.00, and notwithstanding the provisions of the telegraph blank as shown by sub-paragraph 2 of said special finding No. V.

8. That the Court erred in adjudging and deciding that plaintiff was entitled to recover, notwithstanding the fact that as shown by the special findings no claim in writing for damages was made

to defendant within sixty days after filing of the message, or within sxty days after plaintiff learned that it had failed in transmission.

9. That the evidence is insufficient to support the finding that if plaintiff had received the telegram promptly he would have accepted the offer for his bank stock, and could have delivered such stock in time to avail himself of said offer.

10. That the Court erred in adjudging and deciding that plaintiff was damaged in the sum of $4500.00 with interest thereon from June 18, 1918.

11. That the Court erred in adjudging and deciding in effect that failure to transmit a telegram constitutes gross negligence per se.

12. That the evidence is insufficient to sustain a finding that defendant was guilty of gross negligence in not transmitting and delivering the telegram under the circumstances found in the special findings.

13. That the evidence is insufficient to justify the finding that the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted.

14. That the evidence is insufficient to sustain the finding that on November 30, 1917, and until December 5, 1917, David Miller was ready, able and willing to buy plaintiff's stock in the Idaho National Bank.

15. That the Court erred on the second trial herein in overruling defendant's objection to the testimony of plaintiff that if he had received the telegram in question, he would have sold his bank stock and would have wired a reply accepting the offer contained in the telegram.

16. That the Court erred in striking the testimony of G. H. Hackett as to how he accounted for the misplacing of the telegram.

17. That the Court erred in striking the testimony of Margaret Holland as to how she accounted for the fact that she misplaced the telegram in question.

18. That the Court erred in admitting the evidence of the witness T. J. Jones as to conversations had with one David Miller with reference to the purchase by Miller of plaintiff's stock.

19. That the Court erred in admitting in evidence the testimony of the witness T. J. Jones as to conversations with one G. H. Hackett in relation to the defendant's failure to transmit the telegram involved herein, and the supposed liability of defendant for such failure.

WHEREFORE, The defendant prays that the judgment of the District Court herein be reversed and the Court directed to enter judgment in favor of defendant.

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Defendant.

Service of the above and foregoing assignment of errors and receipt of a copy thereof, is hereby acknowledged this 17th day of May, 1922.

RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Plaintiff.

Endorsed:
Filed May 19, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Western Union Telegraph Company, a New York corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto J. A. Czizek, the above named plaintiff, in the penal sum of Eight Thousand Dollars ($8000.00) to be paid to the said J. A. Czizek, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 17th day of May, 1922.

The condition of this obligation is such that, whereas the above defendant, Western Union Tele-

graph Company, has petitioned for writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit made and entered in the said United States District Court for the District of Idaho, Southern Division, on the 11th day of March, A. D. 1922.

NOW, THEREFORE, The condition of this obligation is such that if the above named defendant and plaintiff in error shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation shall be void, and otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, The said Western Union Telegraph Company has caused its corporate name to be hereunto subscribed by its attorneys in said suit, and the said United States Fidelity & Guaranty Company, as surety, has caused its corporate name to be hereunto subscribed and its corporate seal affixed by its attorneys in fact thereunto duly authorized by its Board of Directors, the day and year above written.

WESTERN UNION TELEGRAPH COMPANY.
By RICHARDS & HAGA,
Its Attorneys.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By HENRY WHITSON,
J. J. McCUE,
Its Attorneys in Fact.

(Corporate Seal)

The foregoing bond is hereby approved to operate as a supersedeas, and all proceedings in the District Court under the judgment appealed from are hereby stayed.

Dated this 19th day of May, 1922.

(Signed) FRANK S. DIETRICH,
District Judge.

Endorsed:

Filed May 19, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

WRIT OF ERROR.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between J. A. CZIZEK, Plaintiff, and WESTERN UNION

TELEGRAPH COMPANY, defendant, a manifest error hath happened to the great damage of the said defendant, Western Union Telegraph Company, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, in said Circuit, on the 18th day of June next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS The Honorable William H. Taft, Chief Justice of the United States, this 19th day of May, A. D. 1922, and of the independence of the United States the one hundred forty-sixth.

W. D. McREYNOLDS,
Clerk of the United States District Court for the District of Idaho, Southern Division.

The foregoing writ of error is hereby allowed.

FRANK S. DIETRICH,
District Judge.

I hereby certify that a copy of the foregoing writ of error was on the 19th day of May, 1922, lodged in the Clerk's office of the said United States District Court for the District of Idaho, Southern Division, for the said plaintiff who is defendant in error under said writ.

W. D. McREYNOLDS,
Clerk of the United States District Court for the District of Idaho, Southern Division.

(Seal)

Endorsed:

Filed May 19, 1922,
W. D. McREYNOLDS, Clerk.

CITATION.

THE UNITED STATES OF AMERICA, ss:
To J. A. Czizek:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein Western Union Telegraph Company, a corporation, is

plaintiff in error, and you, J. A. Czizek, defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 19th day of May, A. D. 1922, and of the independence of the United States the one hundred forty-sixth year.

FRANK S. DIETRICH,
District Judge.

ATTEST:
W. D. McREYNOLDS,
Clerk.
(Seal)

Service of the foregoing citation and receipt of a copy thereof admitted this 22nd day of May, 1922.

RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Defendant in Error.

Endorsed:
Filed May 22, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PRAECIPE.

To W. D. McREYNOLDS, Clerk of the above entitled Court:

You will please prepare the record upon the writ of error of defendant and plaintiff in error, Western Union Telegraph Company, taken in the above entitled cause from the judgment made and entered in said cause on the 11th day of March, 1922, such record to consist of the pleadings, documents and papers in such cause, in the following order:

1. Complaint.
2. Answer.
3. Decision of the Court filed February 21, 1922.
4. Special findings of fact.
5. Judgment.
6. Bill of exceptions as hereafter settled and allowed by the Court.
7. All papers filed in connection with writ of error herein, to-wit: Petition for writ of error, assignments of error, order allowing writ of error, bond on writ of error with order approving same, writ of error, citation, and this praecipe, together with your return to the writ and your certificate.

In preparing the above record you will please omit the title to all pleadings except the complaint, inserting in lieu thereof the words, "Title of Court and Cause," followed by the name of the pleading

or instrument. You will also please omit the verification of all pleadings, inserting in lieu thereof whenever the pleading is verified, the words, "Duly verified."

Dated this 24th day of May, 1922.

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Defendant and Plaintiff in Error.

Service of the above praecipe and receipt of a copy thereof is hereby admitted this 24th day of May, 1922.

RICHARD H. JOHNSON,
CAREY H. NIXON, by E. G.,
Attorneys for Plaintiff and Defendant in Error.

Endorsed:

Filed May 24, 1922,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 138, inclusive, to be full, true and correct copies of the pleadings and proceedings

in the above-entitled cause, and that the same, together constitute the transcript of the record herein, upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $160.15, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 10th day of June, 1922.

W. D. McREYNOLDS,
Clerk.

(Seal)

[Endorsed]: Printed Transcript of Record. Filed June 13, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3885

United States

Circuit Court of Appeals

For the Ninth Circuit.

WESTERN UNION TELEGRAPH COMPANY,
a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Order of Submission.

ORDERED above-entitled cause argued by Mr. Beverly L. Hodghead, counsel for the plaintiff in error, and by Mr. Richard H. Johnson, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a supplemental brief within ten (10) days from date.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twelfth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable FRANK H. RUDKIN, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * Western Union Telegraph Company, a Corporation, Plaintiff in Error, vs. J. A. Czizek, Defendant in Error. No. 3885. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

BEVERLY L. HODGHEAD and RICHARDS & HAGA, for Plaintiff in Error. FRANCIS R. STARK, of Counsel.

RICHARD H. JOHNSON and CAREY H. NIXON, for Defendant in Error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge:

This is the second appeal. The facts of the case are adequately set forth in the opinion rendered when it was first here, and it is unnecessary to repeat them. Under stipulation of counsel, entered at the trial in the District Court, it was agreed that the testimony taken on the former trial should be considered to have been taken in the present cause, to the same extent as though the witnesses were produced, subject, however, to all legal objections shown by the record on the former trial;

and that, in addition to such testimony, the evidence should be confined to the testimony of G. H. Hackett and Mrs. Margaret Holland, and such evidence upon the value of the stock of the Idaho National Bank as might be produced by either party.

At the request of plaintiff in error, defendant below, the Court made certain findings of fact and of law, which are in the record and will receive consideration later.

Since the Congress has accorded to the Interstate Commerce Commission administrative control of the regulation of rates to be charged by telegraph companies in prosecuting their business in sending and receiving messages, etc., for remuneration, it has become an established principle of law that, by reason of the telegraph companies' authority to establish reasonable rates, they likewise possess the primary authority to provide rates for unrepeated messages, and the right to fix a reasonable limitation of responsibility where such rates are charged. Postal Tel.-Cable Co. vs. Warren-Godwin Co., 251 U. S. 27.

So it is that the sender of an unrepeated message at the lower rate cannot escape the attendant limitation of liability. Western Union Tel. Co. vs. Esteve Bros. & Co., 256 U. S. 566.

It is now strenuously urged that the principle is applicable here, and, being so applicable, is preclusive of plaintiff's recovery. The very question, however, was determined to the contrary on the former appeal, and it was held that the present

case was not controlled thereby, for reasons then stated. See Czizek vs. Western Union Telegraph Co., 272 Fed. 223. That holding has now become what is termed the law of the case. It is controlling upon this appeal, and was controlling with the trial court. This doctrine has been so many times affirmed and reaffirmed that it is scarcely subject to controversy.

> "It has been settled by the decisions of this court," says the Supreme Court in Roberts vs. Cooper, 20 How. 467, 481, "that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation."

So the Court of Appeals, Eighth Circuit, in Burns vs. Cooper, 153 Fed. 148, 151, says:

> "As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and every question which might have been then

raised in opposition to the decision, *res judicata* between the parties to it as respects the claim or cause of action there litigated."

To the same effect, see Messinger vs. Anderson, from the Sixth Circuit, 171 Fed. 785, where Lurton, Circuit Judge, says:

"No other rule is conceivable having regard to the necessity of putting an end to litigation."

See also, from this circuit, Mutual Life Ins. Co. vs. Hill, 118 Fed. 708; Olsen vs. North Pacific Lumber Co., 119 Fed. 77, 79; Montana Mining Co. vs. St. Louis Min. & Mill Co., 147 Fed. 897; National Bank of Commerce vs. United States, 224 Fed. 679; Bodkin vs. Edwards, 265 Fed. 621, 622.

True, the expression "the law of the case" does not signify a limitation of power or of jurisdiction, yet it embodies a wholesome rule, which the courts apply to put an end to litigation, and there exists no persuasive reason why it should not be applied in the present case. Counsel's contention in respect to the point under discussion is, therefore, not well taken.

This Court in the former case applied its ruling to all the limitations indorsed on the message, including the clause limiting the time for presenting claim for damages to sixty days, and rendered them of no avail under the evidence attending the neglect in transmitting the message; it being considered that the Telegraph Company was guilty of gross negligence. These matters, for like reasons, are not again open for controversy, unless the additional testimony of Hackett and Holland renders them so. Of this later.

The plaintiff in error is likewise precluded from now insisting that the District Court erred in admitting certain testimony relating to whether defendant in error would have accepted the price offered for the stock had the telegram reached him in ordinary course. The alleged error is based upon objections and exceptions which were taken and saved at the former trial, and were available for controversy on the prior appeal.

As to the testimony of Hackett and Holland, as it is stipulated it would be if they were called, Hackett relates that he was local manager of the Western Union at the time; that he had no knowledge of the filing of the message; that all messages filed are at the close of business each day checked over to ascertain whether they have been properly transmitted; that this fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it, which include the initials of such operator and the time of transmission; that, after this check is made, the messages for the particular day are bound together and tied with a string, and laid away for future reference; that he found the missing message in the files of a previous day, and it bore the initials of the clerk who received it from the sender at the counter, but had no operator's check indicating that it had been transmitted, and no perforation showing that it had ever been placed on the operator's hook; that the duty of the clerk who received the message, after endorsing her initials and the filing time thereon, and the amount of the

toll, was to place the message upon the operator's hook for transmission.

Mrs. Holland (formerly Brown), who was the clerk at the counter, does not remember anything regarding the nature of the message, nor does she recall the circumstances of its delivery at the Western Union office, but she supports Hackett's testimony as to the finding of the message.

The twelfth finding of fact of the Court conforms to this testimony, but draws the deduction that the message was inadvertently put in the file of a former day; and the thirteenth finds that the clerk was a capable and efficient employee, and that the nontransmission of the telegram was due to her inadvertence, and not to any wilful, malicious, or wanton act on her part.

Neither this testimony nor the findings of the court respecting it can be regarded as adequate to overcome this Court's prior holding that the case is one of gross negligence on the part of the plaintiff in error for failure to transmit. Indeed, the findings as drafted contain no specific finding or findings covering pertinent facts that obtained, which were disclosed by the former opinion. We instance only the inquiries of Jones, Jr., made the next day and the day following, at the Western Union office, touching whether the message had been sent, when he was informed by the clerk at the counter, on the first day that it had been sent, and on the next that Czizek had received it.

The fourteenth finding is but a conclusion of law, and is not controlling as a finding of fact.

As we understand the record, the learned trial Judge announced his decision after the conclusion of the trial, holding that plaintiff was entitled to recover, which is the equivalent of a general verdict for the plaintiff. The formal findings were made at the request of the defendant. Nevertheless, viewed in the light of the previous opinion of this Court, they are sufficient to support the judgment.

Special reference is made in the brief of plaintiff in error, under the heading "Specifications of Error," to findings X, XV and XVIII, whereby it is contended that there is no competent evidence in the record to support these findings. From a careful reading of the evidence, it is obvious that the contention is not sustained.

Affirmed.

[Endorsed]: Opinion. Filed February 12, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Idaho, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered February 12, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Stipulation and Order Staying Mandate.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of record for the above-named parties, that the mandate from the Circuit Court of Appeals to the Court below shall be stayed for thirty days from the date hereof, and an order may be made and entered accordingly by the Court, based on this stipulation, without any further showing.

Dated this 3d day of March, 1923.

BEVERLY L. HODGHEAD,
RICHARDS & HAGA,
Attorneys for Plaintiff in Error.
RICHARD H. JOHNSON,
CAREY H. NIXON,
Attorneys for Defendant in Error.

Dated: San Francisco, Calif., March 9, 1923.

So ordered:

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Stipulation and Order Staying Mandate. Filed March 9, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Opinion of United States District Court for the District of Idaho, Southern Division, Dietrich D. J., in Case of J. A. Czizek vs. Western Union Telegraph Company, Reversed by Opinion of United States Circuit Court of Appeals Reported in 272 Fed. 223.

(Title of Court and Cause)

DECISION.

April 28, 1920.

RICHARD H. JOHNSON, Attorney for Plaintiff.

RICHARDS & HAGA, Attorneys for Defendant.

DIETRICH, District Judge:

This suit is brought to recover damages for failure of the defendant to send the following telegram:

"November 30, 1917.

"J. A. Czizek,

"5767 Shafter Avenue,

"Oakland, Calif.

"Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

"T. J. JONES."

It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the de-

fendant's office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant's Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for $4,500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been, worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for $90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the plaintiff's failure to make demand within the period specified on the telegraph blank.

While the point is controverted, I think it also clear that in filing the message the sender was acting for the plaintiff and as his agent. Fairly construed, the complaint so implies, and in his letter or demand of June 18th the plaintiff used this language: "It (the message) was sent to me by my

associate and agent, Mr. T. J. Jones, of Boise, Idaho." This view, it may be added, is also corroborated by other circumstances shown in evidence.

I further find that Miller desired and was able to buy the stock at $90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of $90.00, and, had it been delivered, such is the meaning it would have conveyed to him. Besides the contention that no damage can be recovered because at most the message advised the plaintiff only of an offer to buy and there is no way of knowing whether he would or would not have accepted, defendant relies upon three defenses predicated upon the printed conditions endorsed upon the blank form upon which the message was written. This endorsement is as follows:

> "To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the original office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this company as follows:
>
> "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the

transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent thereof.

* * * * * * *

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

The message being interstate in its character is subject to Federal law, and these clauses are to be considered in the light of the Interstate Commerce Act, especially as amended by the Act of June 18th, 1910, 36 Stat. 539. Postal Telegraph Co. vs. Warren-Goodwin L. Co. (U. S. Supreme Court decision, December 8, 1919). Western Union Tel. Co. vs.

Boegli (U. S. Supreme Court decision, January 12, 1920). Certain general principles involved are thought to be illuminated by the following cases: B. & M. R. R. Co. vs. Hooker, 233 U. S. 97. Erie R. R. Co. vs. Stone, 244 U. S. 332. Georgia F. & A. R. Co. vs. Blish. M. Co., 241 U S. 190. St. Louis I. M. & S. Co. vs. Starbird, 243 U. S. 592. Southern Pac. R. R. Co. vs. Stewart, 248 U. S. 446. Gardner vs. Western Union Tel. Co., 231 Fed. 405. Western Union Tel. Co. vs. Lange, 248 Fed. 656. Gooch vs. Oregon Short Line R. R. Co. (C. C. A., 9th Cir., Decision filed April 5, 1920).

It should be added that the form of the telegraph blank here involved, with the indorsement thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

Under the cases cited it is thought to be clear that stipulations requiring claims for damages to be presented in writing within a specified period are valid and binding when reasonable in their terms and not prohibited by statute or opposed to considerations of public policy. As applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have to be held unreasonable, for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time. But I am inclined to think that the proper view to take of the provision is

that the period of limitation did not begin to run until the plaintiff learned of the default and that he had sixty days thereafter in which to present his claim. I do not find that the precise point has been passed upon, but such seems to be the view implied in Telegraphic Co. vs. Nichols, 159 Fed. 643, and Telegraph Co. vs. Lee, 192 S. W. 70.

Admittedly the plaintiff had full knowledge on February 14th, but did not make demand until June 18th, a period of a little more than four months. If I have properly interpreted the stipulation, it necessarily follows that the claim is barred.

Were the question one of first impression, I would have difficulty in declining the view that the "repeated telegram" clause is applicable and binding. In terms it covers nondelivery as well as errors in transmission and delays, and, under the evidence, it appears that "repeated" messages are so handled that failure to transmit is less likely to occur than in a case of ordinary messages. But in the Lange case (248 Fed. 656), involving facts somewhat different, it is true, the Circuit Court of Appeals for this circuit reached a contrary conclusion, which is deemed to be controlling.

The validity and applicability of the "specially valued" clause are challenged upon two grounds: It is first urged that the charges for telegrams of that class are unreasonable and prohibitive. But such objection is not thought to be available to the plaintiff in an action of this character. Erie R. R. Co. vs. Stone, 244 U. S. 332. The other contention

is that the default under consideration constitutes "gross negligence" and that it was incompetent for defendant to stipulate against responsibility therefor. "Gross negligence" is a phrase of vague and flexible import, and, as often used, its meaning is obscure. There is no evidence that the defendant willfully or fraudulently withheld the message from its wires. The failure was doubtless due to a want of care on the part of an office employee, but I do not think it could be held that with the exercise of ordinary care such a default would be impossible. There is nothing unusual on the face of the message—nothing to impress those into whose hands it may have come that it was of special importance; and no suggestion to that effect was made when it was filed. The very purpose of "repeated" or "specially valued" messages, it is to be assumed, is to put employees on their guard and to protect the Company against a default of this character as well as against errors in transmission, and delays. The statute expressly recognizes such classifications, and if the tariff is too high, the remedy, as already indicated, is with the Interstate Commerce Commission. The plaintiff is bound by the conditions he accepted, and he cannot now escape the obligations thereof by claiming that the charges for sending a "valued" telegram would have been excessive.

As already stated, the other defense is that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram. It involves the question whether he would or would not have embraced the

opportunity of which the telegram was intended to advise him, and, if so, whether he could and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good. The inherent difficulty, held to be insuperable in many of the cases, is the impossibility of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened. Would the plaintiff have accepted the offer? Jones, the sender of the message, did, after some consideration of the conditions as he knew them, decide to accept a similar offer for his stock. However, it will be noted that he made no recommendation to the plaintiff, and in the telegram avoided the expression of any very positive opinion as to what was best to do. He said only: "I am inclined to accept for mine." We have no way of knowing whether the plaintiff, who was necessarily ignorant of the precise situation, would have sought to negotiate for a higher price and thus lost the opportunity. Manifestly, to take advantage of the offer it was necessary to act promptly, for there was a crisis in the affairs of the bank and apparently in Miller's financial ability, and counsel for the defendant argue with much plausibility that even had the telegram been sent and delivered plaintiff would not have been able to get the stock to Boise within the required time. Applying the principle recognized in many, and, so far as I am advised, most, of the decided cases, I feel impelled to sustain the defense. Western

Union Tel. Co. vs. Hall, 124 U. S. 444. Richmond H. Mills vs. Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290. Bennett vs. Western Union Tel. Co., 129 Ia. 607, 106 N. W. 13. Smith vs. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. Western Union Tel. Co. vs. Odams Mach. Co., 92 Miss. 849, 47 So. 412. Cherokee T. Ex. Co. vs. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777. Harmon vs. Western Union Tel. Co., 65 S. C. 490, 43 S. E. 959. Beatty L. Co. vs. Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309. Fisher vs. Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545. Western Union Tel. Co. vs. Watson, 94 Ga. 202, 21 S. E. 457. Bass vs. Postal Tel. Cab. Co., 127 Ga. 423, 53 S. E. 465. Wilson vs. Western Union Tel. Co., 124 Ga. 131, 52 S. E. 153. Western Union Tel. Co. vs. Webb, 48 So. 408. Western Union Tel. Co. vs. Ferguson, 54 L. R. A. 846. Hall vs. Western Union Tel. Co., 27 L. R. A. (N. S.) 639.

Endorsed: Filed April 29, 1920.

W. D. McREYNOLDS,
Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3543.

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals in J. A. Czizek vs. Western Union Telegraph Company, No. 3543 (272 Fed. 223), Referred to in Opinion in Case No. 3885.

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

Before GILBERT, MORROW and HUNT, Circuit Judges:

HUNT, Judge:

Action instituted in the state court for damages because of failure to forward and deliver a telegram dated at Boise, Idaho, November 30, 1917, addressed to J. A. Czizek, 5767 Shafter Avenue, Oakland, Calif., and reading as follows:

> "Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.
>
> "T. J. JONES."

On petition of the Telegraph Company the case was removed to the Federal Court, and after trial judgment was rendered in favor of the Telegraph Company.

We must first notice a question of jurisdiction presented by plaintiff in error and a motion to strike the bill of exceptions presented by defendant

in error. Removal from the state court to the United States court in the District of Idaho was on the ground that Czizek was a citizen of Idaho and the defendant a New York corporation. Czizek moved to remand to the state court on the ground that he was a citizen and resident of California. In support of his motion affidavits were filed, and defendant filed counter-affidavits. On October 10, 1919, the Court denied the motions. Exception was allowed but no bill of exceptions covering the ruling was prepared or settled during the term of court at which the ruling was made, nor was any order granted for an extension of the time in which to prepare a bill of exceptions. The Telegraph Company by answer denied the allegations of the complaint in part, but admitted the presentation of the message by Jones to the Telegraph Company, receipt and acceptance by the company, and payment of the regular charges. It also admitted that Czizek and Jones were told at the office of the Telegraph Company in Boise that the message never had been sent. Other defenses are based upon the following conditions printed on the back of the telegraph blank:

> "To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed

between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent thereof.

* * * * * * * * * * *

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

Defendants also pleaded that the message was interstate, subject to the rules of the Interstate Commerce Commission.

On June 5, 1920, plaintiff petitioned for a new trial and on June 17, 1920, the Court overruled the motion and granted plaintiff until July 8, 1920, within which to file and serve a proposed bill of exceptions to the rulings, findings and decision of the Court. The bill of exceptions contains all the evidence and was filed and served on July 2, 1920. Defendant moved the District Court to strike the proposed bill of exceptions from the file. The Court denied the motion to strike the entire bill, but struck out the part which related to the motion to remand for the reason that a "bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made." Exception was saved, and the bill of exceptions was settled July 16, 1920. The time for preparing a bill of exceptions to the ruling on the motion to remand expired October 20, 1919, and the term at which such ruling was made expired on February 7, 1920, but as to the other matters, the extensions granted were during the term of the court at which trial was had and the time for preparing bills of exceptions did not expire until July 8th. Under the circumstances, after the Court decided the issue of fact as to residence, it was right in retaining jurisdiction and in striking the portion pertaining to the motion to remand.

Anderson vs. United States, 269 Fed. 65. The Court also had authority to deny the motion to strike the other portions of the bill of exceptions as presented, although they were not prepared and submitted as required by the rules of the court. Hunnicutt vs. Peyton, 102 U. S. 333; Russo-Chinese Bank vs. National Bank of Commerce, 187 Fed. 80. The main issues of the case are therefore properly for consideration.

The facts are:

Plaintiff owned fifty shares of stock in the Idaho National Bank worth on their face $5,000. T. J. Jones owned fifteen shares of the same stock. Miller, a stockholder, wished to buy plaintiff's stock in order to effect a merger of two banks. Plaintiff told Miller that he wished to sell, but no agreement was reached. Plaintiff said he was going away, but on his return would be ready to negotiate. Plaintiff told Jones what Miller said and authorized Jones to negotiate with Miller for him. Miller then went to California and never received the telegram. On December 1st Jones' son inquired at the telegraph office if a message had come for his father and was told there was none. Mr. Jones, Jr., asked the attendant to see if the telegram had been sent. She looked through some files and said it had been sent. On the next day, Jones, Jr., asked again if the message had been sent and was told by the attendant that Czizek had received the telegram. Czizek testified that if he had received the telegram he would have telegraphed acceptance of $90.00 per share. Jones sold his own fifteen shares at $90.00

and received the money therefor. Meanwhile the Idaho National Bank went into liquidation and the stock became valueless and remained so. About February 14th, 1918, Czizek returned to Boise and learned that the message to him from Jones had been given to the Telegraph Company on November 30th to forward. Czizek and Jones at once called upon the local manager of the Company who promised investigation. On February 14, 1918, the manager in Boise wrote that the message had failed in transmission, and enclosed a check for the amount paid as toll. On February 18th, Jones returned the check, writing that acceptance might be construed as settlement. The general manager at Boise then went to see Jones and spoke of settlement, upon the basis of the value of the stock and the amount Miller offered. On June 18th plaintiff made formal demand. On June 19th the manager wrote that the letter had been forwarded to the Company for consideration, and inquiring as to the value of the stock. Thereafter Czizek received a letter from the district superintendent of the Telegraph Company dated July 2, 1918, at Salt Lake, acknowledging claim for $4,500 damages for failure to transmit the message and advising him that the matter had been taken under immediate investigation and that he would be communicated with upon the conclusion of the investigation. The letter also advised Czizek as follows:

> "However, more than 60 days having elapsed since date claim message was filed our investigation will be conducted without prejudice to

the situation created by your failure to bring matter to our attention at an earlier date."

After waiting a reasonable length of time and hearing nothing, this action was commenced in June, 1919.

The principal contentions of the plaintiff in error are that there is no provision requiring presentation in writing within any specific time after plaintiff learns of defendant's default, and that both the time and manner of presenting the claim were waived by defendant.

In Gardner vs. Western Union Teleg. Co., 231 Fed. 405, an action was brought by the addressee of a telegram for delay in the delivery of an unrepeated message. The terms of the contract between the telegraph company and the sender of the telegram were the same as in the present case. The Court of Appeals for the Eighth Circuit held that upon principle the plaintiff was bound by the regulation in relation to the presentation of his claim for damages and said:

> "Without the contract between Scoville (the sender) and the company, the latter owed the plaintiff no duty and hence there could be no negligence in the absence of the contract. So it plainly appears that plaintiff would have no cause of action except for the contract, because the duty of the company arose from the contract. May the plaintiff charge the company with the duty arising from the contract and at the same time repudiate one of the conditions upon which the duty was assumed? We think not."

That case has the express approval of the Supreme Court in Postal Telegraph Cable Co. vs. Warren Goodwin Lbr. Co., 251 U. S. 27, where the Court held that since the act of Congress of June 18, 1910, 36 U. S. Stat. L. 539, the interstate business of telegraph companies was brought under Federal control and that the provisions of the statute which brought telegraph companies under the act to regulate commerce placed them under the administrative control of the Interstate Commerce Commission, and that they became subject to a uniform national rule and that there was no room for the exercise by the several states of power to regulate by penalizing the negligent failure to deliver promptly an interstate telegram. The same general doctrine was reaffirmed in Western Union Teleg. Co. vs. Boegli, 251 U. S. 315. Inasmuch as the record discloses that the telegraph blank on which the message involved was written is on file with the Interstate Commerce Commission, as are the rules governing unrepeated messages and like matters, questions of the reasonableness of the regulations on the back of the blank are primarily for the Interstate Commerce Commission to determine. Mitchell Coal and Coke Co. vs. Penn. R. R. Co., 230 U. S. 247; Erie R. R. Co. vs. Stone, 244 U. S. 332; Western Union Teleg. Co. vs. Bank of Spencer (Okla.), 156 Pac. 1175. In Cultra et al. vs. Western Union Teleg. Co., 44 I. C. C. Rep. 670, approved by the Supreme Court in Postal T. Co. vs. Goodwin, *supra*, the Commission held that it was the intention of Congress to

put under the jurisdiction and control of the Commission the rates and practices of interstate telegraph companies, "as well as the rules, regulations, conditions and restrictions affecting their interstate rates." There, the rate which was used by the senders of the telegram was an unrepeated one to which the Commission held there was attached as a fundamental feature a restricted liability. An error of the telegraph company, caused damage. The telegram was a so-called night letter, charges having been prepaid as for an unrepeated night letter between the point in Kansas and the city of San Francisco. The conclusion reached was that rules classifying messages are binding upon the telegraph company and upon all those who avail themselves of the services of the telegraph company. Under these recent decisions the Interstate Commerce Commission has control of the regulation of rates and of the practices of the company, and by sanctioning a rule whereby liability of the company is restricted the rule is made binding. To like effect are Haskell I. & S. Co. vs. Postal Teleg. Cable Co. (Me.) 96 Atl. 219; Western Union Teleg. Co. vs. Dant, 42 App. D. C. 398.

But while the rules just examined and the cases discussing them show the trend of modern decision, we are not ready to hold that the case before us is brought within them. This is not an instance of delay or error in transmission or in delivery such as is contemplated by the rules referred to, but is one where the Telegraph Company, holding itself out as ready and able to perform service for

a valuable consideration fixed by itself and paid to it, undertook to transmit a message and without any excuse at all failed completely to forward the message or to make an effort to fulfill its obligations. Such inattention is not within the terms printed upon the back of the message which as far as pertinent are held to form part of the contract between the sender of the message and the Telegraph Company. Reasonable regulations and terms, the purposes of which are to restrict the liability of the Company for consequences of negligence by reason of the omissions of its employees or the improper or insufficient performance of duty in transmission and delivery, should not be construed as absolving the company from all obligation to perform the duty for which it was created. Public policy, so we think, would not permit of the approval of regulations which would relieve the company from liability for such a total failure to live up to its duty; and in the absence of a controlling decision we must hold that no regulation of the company has released it from liability for its gross negligence in the premises. Pac. Postal Teleg. Co. vs. Fleischner, 66 Fed. 899; Candee vs. W. U. Teleg. Co., 34 Wis. 471; U. S. Teleg. Co. vs. Wenger, 55 Penn. St. 262.

In accord with what we have said, the clauses with relation to unrepeated and specially valued messages do not apply. There was no mistake in verbiage and as the message was never sent it was of course impossible to repeat it. As bearing upon the question we cite: Western U. Tel Co. vs.

Cook, 61 Fed. 624; Pac. P. Tel. Co. vs. Fleischner, 66 Fed. 899; Swan vs. W. U. Teleg. Co. 129 Fed. 318; Postal Tel. Co. vs. Nichols, 159 Fed. 643.

It is earnestly argued that even if gross negligence is found, the valuation clause in the contract of transmission, hereinbefore quoted, must be held to limit the recovery to fifty dollars. Granting such a restriction is valid and binding where there has been mistake or delay in transmission or delivery or where the message has been transmitted but not delivered whether such errors have been caused by the negligence of the servants of the Company or otherwise, we do not construe nondelivery as the full equivalent of nontransmission. Nondelivery might be because of the carelessness of a boy employed by a receiving office to deliver a transmitted message. If the company used all reasonable care to employ a trustworthy messenger to deliver at a designated place and to a named person, but the messenger should fail to deliver and damages are the result, it may well be that the nondelivery clause as a reasonable one would relieve the company of liability for more than fifty dollars. But we cannot get away from the all important fact that this is a case of nontransmission without excuse and as such is not covered by clauses which are predicated upon the supposition that the company has made reasonable effort to transmit over its wires.

Regarding the case, therefore, as one of gross negligence against the company for failing to perform its undertaking, the liability should be for

such damage as plaintiff in error actually sustained. The meaning and import of the message were perfectly plain on face of the paper; hence, cases where cipher messages were involved are not controlling. Czizek's testimony is positive, and the circumstances sustain it, that he would have sold the stock at the price offered in the message that was not transmitted and the evidence is that he would have been paid the price offered; but a few days afterwards, because of the failure of the bank, the stock became practically worthless. Under the facts, the difference between what he was offered and would have accepted and the value of the stock at about the time he called upon the manager at Boise is the measure of damage. U. S. Teleg. Co. vs. Wenger, 55 Penn. St. 262; Harron vs. W. U. Teleg. Co. (Iowa), 57 N. W. 696.

The judgment is reversed and the cause is remanded for a new trial.

[Endorsed]: Opinion. Filed April 4, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-two (172) pages, numbered from and including 1 to and including 172, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, including opinion of Dietrich, D. J., in J. A. Czizek vs. Western Union Telegraph Company, and opinion of Circuit Court of Appeals in said case, certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of March, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

WRIT OF CERTIORARI AND RETURN—Filed July 30, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is plaintiff in error, and J. A. Czizek is defendant in error, No. 3885, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Idaho, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

Upon Writ of Error to the United States District Court for the District of Idaho, Southern Division

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI

It is hereby Stipulated and Agreed by and between the Attorneys of Record for the respective parties in the above entitled cause, that the Transcript of Record now on file in the Supreme Court of the United States in the Case of Western Union Telegraph Company, a corporation, petitioner, vs. J. A. Czizek, respondent, No. 1012, October Term, 1922, of said Supreme Court, shall stand as the Return of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, to the Writ of Certiorari issued out of said Supreme Court on the 21st day of May, 1923.

Provided, however, and it is expressly agreed that nothing in this stipulation shall be deemed to be a waiver on the part of defendant in error of any objections he may deserve to make to the consideration in the Supreme Court of the Record upon the first writ of error from the Circuit Court of Appeals to the District Court, or any part thereof, contained in said Transcript now on file in the Supreme Court.

Francis R. Stark, Beverly L. Hodghead, Richards & Haga, Attorneys for Plaintiff in Error and Petitioner. Richard H. Johnson, Carey H. Nixon, Attorneys for Defendant in Error and Respondent. Dated June 8th, 1923.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed July 9, 1923. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPULATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 9th day of July, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 9th day of July, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

[File endorsement omitted.]